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United States

Circuit Court of Appeals

For the Ninth Circuit.

SARAH POOL,

Appellant,

vs.

JAMES A. WALSH, as Collector of Internal Revenue of Montana,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3780

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Names and Addresses of Solicitors of Record

Messrs. PATTERSON & HEYFRON, Missoula, Montana, and

Messrs. RUSSELL, MADEEN & BARRON, Missoula, Montana,

Solicitors for Complainant and Appellant.

JOHN L. SLATTERY, Esq., United States Attorney for the District of Montana, Helena, Montana, and

RONALD HIGGINS, Esq., and W. H. MEIGS, Esq., Assistant United States Attorneys for the District of Montana, Helena, Montana,

Solicitors for Defendant and Appellee.

In the District Court of the United States, District of Montana.

No. 193—IN EQUITY.

SARAH POOL,

Complainant,

vs.

JAMES A. WALSH, as Collector of Internal Revenue,

Defendant.

BE IT REMEMBERED, that on April 23, 1921, bill of complaint was filed herein; in the words and figures following, to wit: [1*]

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*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, for the District of Montana.

SARAH POOL,

Plaintiff,

vs.

JAMES A. WALSH, as Collector of Internal Revenue,

Defendant.

Bill in Equity.

Your petitioner, Sarah Pool, respectfully shows to the Court as follows, to wit:

I.

That she is a citizen of the United States and of the State of Montana, and resides in Missoula County, Montana, and is, and at all times hereinafter mentioned has been, the lawful wife of Frank E. Pool, and as his wife, has been living with said Frank E. Pool.

II.

That the defendant is the duly appointed, qualified and acting Collector of Internal Revenue for the District and State of Montana.

III.

That for a long time prior to the fourteenth day of April, 1921, the plaintiff in this action, was the owner and holder of two certain certificates of deposit, one for the sum of Thirteen Hundred ($1300.00) Dollars, and the other for the sum of One Thousand ($1000.00) Dollars, totaling Twenty-

three Hundred ($2300.00) Dollars, in the Missoula Trust and Savings Bank, in the City of Missoula, and State of Montana, and that such certificates of deposit were and are, the sole and individual property of this petitioner.

IV.

That on or about the fourteenth day of April, 1921, the defendant in this action, as Collector of Internal Revenue for the District of Montana, wrongfully, illegally and without authority therefor, attached by distraint said certificates of deposit and has notified and instructed the said Bank, holding said certificates of deposit, to retain the same in the custody of said Bank, and not deliver them to the petitioner herein. That the said Collector of Internal Revenue in pursuance of such attachment and warrant of distraint, has given notice and threatened and does now threaten to, and will unless restrained, [2] on the eleventh day of May, A. D. 1921, sell said certificates of deposit, to satisfy a purported claim against the husband of this petiitioner, Frank E. Pool.

V.

That said pretended warrant for distraint is and was issued and levied upon the said premises under and upon the pretended claim that your petitioner's husband was chargeable with and indebted to the United States for taxes and penalties purported to have been assessed and charged against him by the defendant, for alleged violation of the Internal Revenue Laws of the United States, by the illicit man-

ufacture of intoxicating liquors, but your petitioner, upon her oath alleges and shows to the Court that she is not liable for any taxes or penalties for violation of said laws; that no taxes have been assessed against her by the United States, or any of its officers, and that your petitioner is not liable or chargeable with any taxes or penalties; and that said purported warrant of distraint, and the proceedings thereunder are not based upon any tax, but upon a penalty or fine purported to be imposed against your petitioner's husband for violation of laws, and your petitioner further alleges that said warrant for distraint was without authority of law, wrongfully issued, and wrongfully and illegally levied upon the property of your petitioner; and that the threatened sale of said property is wrongful and without authority of law, and if permitted to be consummated by sale, will work a grevious hardship and irreparable injury to your petitioner.

VI.

That no civil or criminal suit or action has been commenced by said defendant to determine your petitioner's liability to any tax or penalty.

VII.

That your petitioner has no personal property, nor any fund with which to pay said pretended claim of said defendant, and is unable to pay the same, and that if said property is sold as threatened, your petitioner will be deprived thereof without due process of law.

VIII.

That the proposed action of the defendant in selling said property, as hereinbefore set forth, without your petitioner having a day in [3] Court or opportunity to have her rights heard and determined by a competent court, is in violation of and contrary to the Fifth Amendment to the Constitution of the United States and the Bill of Rights, and constitutes taking her property without due process of law, and that this plaintiff has no adequate or speedy remedy at law.

IX.

That the proposed action of the defendant in selling the said property, and the said pretended warrant and levy of distraint as hereinbefore set forth, is in truth and in fact a punishment of your petitioner for her husband's crime in operating an illicit still and otherwise violatingt he National Prohibition Act, without a trial by jury and if the same be committed, your petitioner will be punished for an offense which she has never committed, and which she is not charged, or alleged to have committed.

X.

That your petitioner is advised by her attorneys and believes it to be true that it is impossible to serve the required notice of five days upon the defendant, of the application of her injunction but in absolute good faith asks the Court to make such injunction temporary and preliminary until such time as notice can be given and hearing had thereon.

WHEREFORE, This petitioner prays this Honorable Court for an order restraining and enjoining the defendant, James A. Walsh, Collector of Internal Revenue for the District of Montana, from any further proceedings whatsoever in pursuance of the said pretended writ of attachment and warrant for distraint, and from selling, or attempting to sell said certificates of deposit, and that upon the answer and return of the defendant, that the Court decree and direct that said certificates of deposit be forthwith, delivered to this petitioner, and that she have and recover her costs and disbursements herein.

PATTERSON and HEYFRON,
RUSSELL, MADEEN & BARRON,
Solicitors and Attorneys for Complainant.

State of Montana,
County of Missoula,—ss.

Sarah Pool, being first duly sworn upon oath, deposes and says: [4]

That she is the complainant named and mentioned in the above and foregoing bill in equity; that she has read the same and knows the contents thereof, and that the same is true of her own knowledge.

SARAH POOLE.

Subscribed and sworn to before me this 22d day or April, A. D. 1921.

[Notarial Seal] DAN J. HEYFRON,
Notary Public for Montana, Residing at Missoula, Therein.

My commission expires October 25, 1921.

Filed April 23, 1921. C. R. Garlow, Clerk.

Service accepted and copy received April 23, 1921.

GEORGE F. SHELTON,
United States Attorney.

Thereafter, on April 23, 1921, order to show cause and temporary restraining order was filed herein, being in the words and figures following, to wit: [5]

In the District Court of the United States for the District of Montana.

SARAH POOL,

Plaintiff,

vs.

JAMES A. WALSH, as Collector of Internal Revenue,

Defendant.

Order to Show Cause and Temporary Restraining Order.

The complainant having filed her verified bill of complaint in this court against the defendant above named praying for a preliminary injunction, restraining and enjoining the defendant from levying upon, selling and disposing of her personal property, consisting of two certificates of deposit, in the Missoula Trust and Savings Bank, in the City

of Missoula, and State of Montana, and this Court having duly read and considered said bill of complaint,—

IT IS HEREBY ORDERED, That the defendant James A. Walsh, above named, show cause before this court in the courtroom of said court at Helena, Montana, on the 27th day of April, 1921, at ten o'clock in the forenoon of that day, why he, the said defendant, and all persons acting by, through or under him, should not be restrained and enjoined in accordance with the prayer in said bill of complaint contained, to wit:

> "For an order restraining and enjoining the defendant, James A. Walsh, Collector of Internal Revenue for the District of Montana, from any further proceedings whatsoever in pursuance of the said pretended writ of attachment and warrant for distraint, and from selling, or attempting to sell, said certificates of deposit, and that upon the answer and return of the defendant, that the Court decree and direct that said certificates of deposit be forthwith delivered to this petitioner and that she have and recover her costs and disbursements herein."

Let a copy of this order, and a copy of the bill of complaint be forthwith served upon the above-named defendant, James A. Walsh, by the marshal of this court.

Entered this 23d day of April, A. D. 1921.

BOURQUIN,
Judge.

Received copy and service accepted April 23d, 1921.

GEORGE F. SHELTON,
United States Attorney.

Filed April 23, 1921. C. R. Garlow, Clerk. [6]

Thereafter, on April 27, 1921, answer to order to show cause was duly filed herein, in the words and figures following, to wit:

In the District Court of the United States, District of Montana.

SARAH POOL,

Complainant,

vs.

JAMES A. WALSH, as Collector of Internal Revenue,

Defendant.

Answer to Plaintiff's Order to Show Cause.

Now comes James A. Walsh, Collector of Internal Revenue, and for reply to the order to show cause heretofore issued, avers as follows:

That he is the duly appointed, qualified and acting Collector of Internal Revenue for the State and District of Montana; that there was duly imposed by the Commissioner of Internal Revenue, pursuant to law, a tax upon the said Sarah Pool, the plaintiff above named, under the Revenue Laws of the United States.

That a warrant of distraint was issued for the collection of said tax, pursuant to law, by James A. Walsh, Collector of Internal Revenue for the District of Montana, as aforesaid and duly levied upon the property mentioned and described in the plaintiff's bill in equity, filed herein.

That pursuant to the authority vested in him as Collector of Internal Revenue, the said James A. Walsh advertised the said certificates of deposit in said complaint mentioned, for sale, and published notice thereof as required by law.

That this suit is brought to restrain the said Collector of Internal Revenue from proceeding with the said sale in his efforts to collect the said tax so imposed, as aforesaid, upon the said plaintiff, Sarah Pool, and not otherwise.

That the said Sarah Pool has not paid the said tax or any part thereof, and the same is wholly uncollected at this time.

That the Court has no jurisdiction to restrain the said collection of said tax so imposed, as aforesaid, and the said order to show cause should be denied, and the restraining order heretofore issued should be vacated.

GEORGE F. SHELTON,
United States Attorney, District of Montana. [7]

United States of America,
District of Montana,—ss.

James A. Walsh, being first duly sworn, on oath deposes and says:

That he is the duly appointed, qualified and acting

Collector of Internal Revenue for the District of Montana, and as such makes this verification to the foregoing answer to plaintiff's order to show cause; that he knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

JAS. A. WALSH.

Subscribed and sworn to before me this 27th day of April, 1921.

[Seal] C. R. GARLOW,
Clerk.

Filed April 27, 1921. C. R. Garlow, Clerk.

Thereafter, on April 27, 1921, motion to dismiss the bill of complaint was duly filed herein, being in the words and figures following, to wit: [8]

In the District Court of the United States, District of Montana.

SARAH POOL,

Plaintiff,

vs.

JAMES A. WALSH, as Collector of Internal Revenue,

Defendant.

Motion to Dismiss Bill of Complaint.

Now comes the above-named defendant, and pursuant to equity Rule No. 29, moves the Court to dismiss the bill of complaint herein, for the reason

that it appears upon the face of the complaint that the suit is brought for a purpose expressly forbidden by law, and that the Court has no jurisdiction to proceed the said suit.

GEORGE F. SHELTON,
United States Attorney, District of Montana.

Dated this 27th day of April, 1921.

Received copy April 27, 1921.

RUSSELL, MADEEN & BARRON,
PATTERSON & HEYFRON,
Attorneys for Plaintiff.

Filed April 27, 1921. C. R. Garlow, Clerk. [9]

Thereafter, on May 3d, 1921, the cause was duly heard and submitted to the Court, the record thereof being as follows, to wit:

In the District Court of the United States in and for the District of Montana.

No. 193.

SARAH POOLE
vs.
JAS. A. WALSH,
Collector, etc.

Hearing.

This cause came on regularly for hearing this day on the order to show cause heretofore continued until this date, C. A. Russell, Esq., appearing for the plaintiff, and Geo. F. Shelton, Esq., appearing

for the defendant. Thereupon Sarah Poole was sworn and examined as a witness for plaintiff, and two notices and demands introduced in evidence, whereupon plaintiff rested. Thereupon James A. Walsh was sworn and examined as a witness for defendant; a copy of warrant, a tax lien, a letter and assessment list, introduced, whereupon the evidence being closed, the matter was argued and submitted and by the Court taken under advisement.

Entered in open court this 3d day of May, A. D. 1921.

C. R. GARLOW,
Clerk. [10]

Thereafter, on May 9th, 1921, Court ordered that injunction be denied and suit dismissed, the record thereof being as follows, to wit:

In the District Court of the United States in and for the District of Montana.

No. 193.

SARAH POOLE

vs.

JAS. A. WALSH,
Col. Intr. Rev.

Order Denying Injunction and Dismissing Suit.

This matter heretofore duly heard and submitted to the Court came on at this time for judgment and decision. Thereupon, the Court, after due consid-

eration, ordered that injunction be denied and suit dismissed, in accordance with written decision filed.

Entered in open court this 9th day of May, A. D. 1921.

C. R. GARLOW,
Clerk. [11]

Thereafter, on May 9, 1921, Court filed its decision as follows, to wit:

POOL

vs.

WALSH, Collector.

Decision.

Plaintiff seeks to enjoin defendant from collecting certain taxes and penalties assessed and levied against her by the Commissioner of Internal Revenue, based upon her alleged distillation of intoxicating liquors. She alleges the taxes and penalties are illegal and not owed by her, in that she never engaged in any said operations of distillation, and also that the collection by distraint is oppressive and a hardship.

The statute is, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Sec. 3224, R. S. U. S.

The statute is a bar to the suit. Plaintiff has a remedy in the statutes that provide she shall pay the tax, apply to the Commissioner for refund, then sue to recover. This is exclusive, and justified by

the necessity of revenue to carry on the Government, the collection of which must not be prevented even temporarily by injunction.

The Supreme Court decisions are conclusive.

See Dodge vs. Osburn, 240 U. S. 119.

Snyder vs. Marks, 109 U. S. 189.

In the first case, plaintiff alleged the tax law was unconstitutional, and in the second case he alleged he was not a member of the firm upon which the tax was levied. In brief, that the tax was illegal and not owed, and injunction denied in both. In assessment and levy of taxes the Commissioner acts judicially, determines for himself who is and who is not taxable, and his decision controls until suit after payment and to recover. The Commissioner makes the assessment. He is not limited to the collector's report of taxable persons made to him, but is authorized and directed to assess and otherwise discovered by him and which the collector has failed to report. Our C. C. A. indicates the taxes and penalties can now be assessed and collected as before prohibition.

Farley vs. U. S., 269 Fed. 723.

(See Id. 153.) [12]

So it is not a case of no law for the tax, and mere arbitrary and illegal action by the Commissioner. Injunction denied; suit dismissed.

May 9, 1921.

BOURQUIN,
Judge.

Filed May 9, 1921. C. R. Garlow, Clerk. By H. H. Walker, Deputy. [13]

Thereafter, on May 10, 1921, decree was duly filed and entered herein, being in the words and figures following, to wit:

In the District Court of the United States, District of Montana.

No. 193.

SARAH POOL,

Plaintiff,

vs.

JAMES A. WALSH, as Collector of Internal Revenue,

Defendant.

Decree.

This cause coming on to be heard, upon the motion of the defendant to dismiss the bill, and the case having been argued by counsel and submitted to the Court for decision, and at the same time the application of the plaintiff for a restraining order herein pending, the suit having also come on to be heard, and the law and the premises being fully understood by the Court,—

IT IS ORDERED, ADJUDGED AND DECREED that the application of the plaintiff for a restraining order herein be denied, and the motion of the defendant to dismiss the bill herein is hereby granted.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the bill of complaint herein be and the same is hereby dismissed.

Dated this 10th day of May, 1921.

BOURQUIN,
Judge.

Filed May 10, 1921. C. R. Garlow, Clerk.

Thereafter, on May 31st, 1921, petition for appeal was duly filed herein, being in the words and figures following, to wit: [14]

In the District Court of the United States for the District of Montana.

IN EQUITY.

SARAH POOL,
Complainant,

vs.

JAMES A. WALSH, as Collector of Internal Revenue,
Defendant.

Petition for Appeal.

To the Honorable GEORGE M. BOURQUIN, District Judge:

The above-named plaintiff, Sarah Poole, feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 9th day of May, 1921, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons and upon the grounds set forth in the assignment of errors filed herewith, and she prays that her appeal be allowed, and that citation be

issued as provided by law and that a transcript of the records, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals sitting at San Francisco, under the rules of such court in such case made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of her be made.

DAN J. HEYFRON,
RUSSELL, MADEEN & BARRON,
Solicitors and Counsel for Complainant and Appellant.
DAN J. HEYFRON and
RUSSELL, MADEEN & BARRON,
Missoula, Montana.

Filed May 31st, 1921. C. R. Garlow, Clerk.

Thereafter, on May 31, 1921, assignment of errors was duly filed herein, being in the words and figures following, to wit: [15]

In the District Court of the United States for the District of Montana.

SARAH POOL,
Complainant,

vs.

JAMES A. WALSH, as Collector of Internal Revenue,
Defendant.

Assignment of Errors.

Comes now the complainant in the above-entitled cause and files the following assignment of errors upon which she will rely upon her prosecution of the appeal in the above-entitled cause from the decree made by this Honorable Court on the 9th day of May, 1921, dismissing complainant's bill of complaint.

I.

The Honorable United States District Court for the District of Montana erred in dismissing complainant's suit.

II.

The Honorable United States District Court for the District of Montana erred in holding and deciding that section 3224, Revised Statutes of the United States, precludes complainant and appellant from relief by injunction.

III.

The Honorable United States District Court for the District of Montana erred in holding and deciding that the charges and assessments described and set forth in the warrant for distraint annexed to the bill of complaint, are taxes and assessable as taxes, and collectible by warrant for distraint, and in dismissing plaintiff's bill of complaint on that ground.

IV.

The Honorable United States District Court for the District of Montana erred in holding and deciding that the charges and impositions mentioned and

set forth in Title II, Section 35, of the National Prohibition Act are taxes and may be enforced by sale of complainant's property by warrant for distraint and in dismissing complainant's bill of complaint on that ground. [16]

V.

The Honorable United States District Court for the District of Montana erred in holding and deciding that a sale of plaintiff's property under the levy of a warrant for distraint by the Collector of Internal Revenue for the District of Montana, without any action in court, and without giving the plaintiff a day in court, or opportunity to be heard is not illegal and without authority of law, and is not violative of the Constitution of the United States particularly the Fifth, Sixth, Eighth and Eighteenth Amendments and in dismissing plaintiff's bill of complaint on that ground.

VI.

The Honorable United States District Court for the District of Montana erred in holding and deciding that plaintiff's only remedy is that of payment of the tax, and penalty, and suing for a refund of such payment and in dismissing plaintiff's suit on that ground.

VII.

The Honorable United States District Court for the District of Montana erred in holding and deciding that complainant's bill in equity did not state a cause of action entitling plaintiff to the relief sought.

VIII.

The Honorable United States District Court for the District of Montana erred in dismissing complainant's suit on the ground and for the reasons that in law and equity plaintiff is entitled to the relief sought.

DAN J. HEYFRON,
RUSSELL, MADEEN & BARRON,
Solicitors and Attorneys for Complainant and Appellant.

DAN J. HEYFRON,
RUSSELL, MADEEN & BARRON,
Solicitors and Attorneys for Complainant and Appellant, Missoula, Montana.

Filed May 31, 1921. C. R. Garlow, Clerk. [17]

Thereafter, on June 3, 1921, order allowing appeal was duly filed herein, being in the words and figures following, to wit:

In the District Court of the United States, District of Montana.

IN EQUITY.

SARAH POOL,
Complainant,

vs.

JAMES A. WALSH, as Collector of Internal Revenue,
Defendant.

Order Allowing Appeal.

On motion of Dan J. Heyfron and Chas. A. Russell, solicitors and counsel for complainant, IT IS HEREBY ORDERED that an appeal to the Circuit Court of Appeals of the United States from the decree heretofore filed and entered herein be and the same is hereby allowed and that a certified transcript of the record and all procedings be forthwith transmitted to said Circuit Court of Appeals at San Francisco.

IT IS FURTHER ORDERED that the bond on appeal be fixed at the sum of $300.00 as a bond for costs and damages on appeal.

Dated this 3d day of June, 1921.

BOURQUIN,
Judge.

Filed June 3, 1921. C. R. Garlow, Clerk. By L. R. Polglase, Deputy. [18]

Thereafter, on June 7, 1921, bond on appeal was duly filed herein, being in the words and figures following, to wit:

In the District Court of the United States, District of Montana.

SARAH POOL,

Complainant,

vs.

JAMES A. WALSH, as Collector of Internal Revenue,

Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, That we Sarah Pool, as principal, and Ole N. Holt and Sloan Davis, as sureties, of the county of Missoula, State of Montana, are held and firmly bound unto the United States of America, and the above-named James A. Walsh as collector of Internal Revenue, in the sum of Three Hundred Dollars ($300.00), lawful money of the United States, to be paid to them, and their respective executors, administrators and assigns; to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and each of our heirs, executors and administrators, by these presents.

Sealed with our seals and dated this 6th day of June, 1921.

WHEREAS the above-named complainant has prosecuted an appeal to the Circuit Court of Appeals of the Ninth Circuit to reverse the judgment and decree of the District Court for the District of Montana in the above-entitled cause:

NOW, THEREFORE, the condition of this obligation is such that if the above-named complainant shall prosecute her said appeal with effect and answer all costs if she fail to make good her plea, then this obligation shall be void; otherwise to remain in full force and effect.

SARAH POOLE.
OLE N. HOLT.
SLOAN DAVIS. [19]

State of Montana,
County of Missoula,—ss.

On the 6th day of June, 1921, personally appeared before me Sarah Pool and Ole N. Holt, and Sloan Davis, respectively known to me to be the persons who duly executed the foregoing instrument as parties thereto, and respectively acknowledged each for himself, that they executed the same as their act and deed for the purpose therein set forth.

And the said Ole N. Holt and Sloan Davis, being by me duly sworn, says each for himself, and not one for the other, that he is a resident and householder of the said County of Missoula, Montana, and that he is worth the sum of Six Hundred ($600.00) Dollars over and above his just debts and liabilities and property exempt from execution.

SARAH POOLE.
OLE N. HOLT.
SLOAN DAVIS.

Subscribed and sworn to before me this 28th day of May, 1921.

[Notarial Seal] DAN J. HEYFRON,
Notary Public for the State of Montana, Residing at Missoula, Montana.

My commission expires October 25, 1921.

Filed June 7th, 1921. C. R. Garlow, Clerk.

Thereafter, on September 14, 1921, a citation was duly issued herein, which is hereto annexed, and is in the words and figures following, to wit: [20]

In the District Court of the United States for the District of Montana.

SARAH POOL,

Complainant,

vs.

JAMES A. WALSH, as Collector of Internal Revenue,

Defendant.

Citation on Appeal.

To JAMES A. WALSH, as Collector of Internal Revenue of Montana, Defendant, GREETING:

You are hereby cited and admonished to be and appear at the Circuit Court of Appeals of the United States for the Ninth Circuit to be held at the city of San Francisco, State of California, on the 14th day of October, 1921, pursuant to an order allowing an appeal filed and entered in the clerk's office of the District Court of the United States for the District of Montana, from a final decree signed, filed and entered on the 9th day of May, 1921, in the above-entitled suit, being Equity No. 193, wherein Sarah Pool is plaintiff and you are defendant and appellee, to show cause, if any there be, why the decree rendered against the said appellant as in said order allowing appeal mentioned should not be corrected and why justice should not be done to the parties in that behalf.

Dated at Great Falls, Montana, this 14th day of Sept., 1921.

BOURQUIN,

United States District Judge for the District of Montana.

Service hereof admitted September 14th, 1921.

JOHN L. SLATTERY,

Attorney for Defendant. [21]

[Endorsed]: No. 193. In the District Court of the United States for the District of Montana. Sarah Pool, Complainant, vs. James A. Walsh, as Collector of Internal Revenue, Defendant. Citation on Appeal. Filed Sept. 14, 1921. C. R. Garlow, Clerk. [22]

Thereafter, on September 14, 1921, a praecipe for transcript of record was duly filed herein, being in the words and figures following, to wit:

In the District Court of the United States for the District of Montana.

SARAH POOL,

Complainant,

vs.

JAMES A. WALSH, as Collector of Internal Revenue,

Defendant.

Praecipe for Transcript of Record.

To the Clerk of the Said Court:

Sir: You will please incorporate in conformity

with Equity Rule 75 in the Transcript on Appeal in the above-entitled action the following portions of the record in the above-entitled action: Bill in equity, order to show cause, answer, motion to dismiss, affidavits, decision, decree, petition for appeal, assignment of errors, order allowing appeal, bond on appeal, citation, all journal entries, copy of this praecipe, together with acknowledgment of service of copy thereon on the appellee.

RUSSELL, MADEEN & BARRON,
PATTERSON & HEYFRON,
Attorneys for Appellant.

Service hereof admitted September 14, 1921.

JOHN L. SLATTERY,
Attorney for Defendant.

Filed Sept. 14, 1921. C. R. Garlow, Clerk. [23]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 23 pages, numbered consecutively from 1 to 23 inclusive, is a full, true and correct transcript of the record and proceedings had in said cause, and of the whole thereof, as appears from the original

records and files of said court in my custody as such Clerk, required to be incorporated in the Record on Appeal therein by praecipe filed, with the exception of the "Affidavits" mentioned in said praecipe, of which there is no record in said cause; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Ten & 85/100 Dollars, and have been paid by the appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court, at Helena, Montana, this 28th day of September, A. D. 1921.

[Seal] C. R. GARLOW,
Clerk.

[24]

[Endorsed]: No. 3780. United States Circuit Court of Appeals for the Ninth Circuit. Sarah Pool, Appellant, vs. James A. Walsh, as Collector of Internal Revenue of Montana, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed October 3, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

NO. [illegible]

UNITED STATES CIRCUIT COURT of APPEALS

FOR THE NINTH CIRCUIT.

SARAH POOL,

Appellant,

vs.

JAMES A. WALSH, as Collector of Internal Revenue of Montana,

Appellee.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Montana.

Appearances:

CHAS. A. RUSSELL,
CHAS. N. MADEEN,
H. H. CLARKE,
JOHN E. PATTERSON,
DAN J. HEYFRON,

Attorneys for Appellant.

Filed: .....

.....Clerk.

NO.....

UNITED STATES CIRCUIT COURT of APPEALS

FOR THE NINTH CIRCUIT.

SARAH POOL,

Appellant,

vs.

JAMES A. WALSH, as Collector of Internal Revenue of Montana,

Appellee.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Montana.

Appearances:

CHAS. A. RUSSELL,
CHAS. N. MADEEN,
H. H. CLARKE,
JOHN E. PATTERSON,
DAN J. HEYFRON,

Attorneys for Appellant.

STATEMENT OF THE CASE.

This appeal arises upon a decree of the United States District Court for the District of Montana, dismissing the bill of appellant praying that injunction issue against the appellee to prevent the execution and sale of appellant's property under a certain distraint warrant issued by him, against property owned by the appellant.

The bill (r. 1) set forth that appellant was the wife of one Frank E. Pool, of Missoula, Montana; that the appellee, as Collector of Internal Revenue, for said District, had attached by distraint certain certificates of deposit owned by this appellant and threatened to sell the same to satisfy a purported claim against the husband of this appellant. It was further alleged that the warrant for distraint was issued upon the ground that appellant's husband was chargeable with and indebted to the United States for taxes and penalties purported to be assessed against him by the appellee for alleged violation of the Internal Revenue Laws of the United States for the illicit manufacture of intoxicating liquor.

Appellant in said bill denied that she was liable for any taxes and penalties in violation of said law, and that the said warrant of distraint and penalties thereunder were based, not upon any taxes, but upon a penalty or fine purported to be imposed against appellant's husband for violation of law.

It was further alleged that no civil or criminal suit or action had been commenced by said appellee to

determine appellant's liability to any tax or penalty; that she had no personal property or any funds with which to pay said claim; that she was unable to pay same, and if the property is sold would be deprived thereof without due process of law.

Upon filing this bill an order to show cause and attempted restraining order issued (r. 7) and thereafter the appellee, as Collector of Internal Revenue filed his motion to dismiss the bill of complaint upon the ground that it appeared on the face thereof that the suit was brought for purpose expressly forbidden by law and that the court had no jurisdiction. At the same time the appellee filed his answer in which he alleged that there had been duly imposed by the commissioner of internal revenue a tax upon the said Sarah Pool, plaintiff above mentioned, under the revenue laws of the United States; that a warrant for distraint was issued for collection of said taxes, pursuant to law, by the said appellee and duly levied upon the property mentioned and described in the bill; that appellee had advertised the said certificates of deposit for sale and published the notice thereof as required by law; that the appellant had not paid the said tax, nor any part thereof, and the same was wholly uncollected at the time answer was filed. (r. 9.)

Thereafter (r. 12) the cause came on for hearing and the court ordered that the injunction be denied and the suit dismissed.

In the decision handed down by the court (r. 14) it is recited that the plaintiff seeks to enjoin the defendant

from collecting taxes and penalties assessed and levied against her by the commissioner of Internal Revenue based upon her alleged distillation of intoxicating liquors. The bill is dismissed by the lower court on the ground and for the reason that Section 3224 prohibits any suit for purpose of restraining assessment for collection of any tax and this statute operates as a bar to that suit here.

The decree (r. 16) grants the motion of defendant to dismiss the bill and orders, adjudges and decrees that the bill of complaint be dismissed.

Briefly, the salient facts are that the distress proceedings by the Collector of Internal Revenue sought to be enjoined in this suit, purport to be instituted for the recovery of a tax and a penalty for the illicit manufacture of intoxicating liquor under the provisions of Section 35 of Title II of the National Prohibition Act. The taxes have been levied by said Collector assessed against appellant. The illicit manufacture upon which it is based was carried on by the husband of this appellant at their joint home, and this appellant did not participate therein in any manner.

While not incorporated in the record it is a fact, as the writer of this brief feels bound to bring every irregularity to the court's attention, that the federal revenue officers sought to bring criminal proceedings against this appellant as a participant in the crime for which her husband was prosecuted, and that the lower court ordered the proceedings against her dismissed forthwith as not being shown in any way to be

a party to the said illicit manufacture of liquor, on the ground that she could not be held criminally liable for actions committed by her husband.

Notwithstanding this action by the lower court the appellee herein assessed both fine and penalty against this appellant and is now attempting to collect it through the medium of a warrant of distraint and sale of her separate individual property.

ASSIGNMENT OF ERROR.

I.

The Honorable United States District Court for the District of Montana erred in dismissing complainant's suit.

II.

The Honorable United States District Court for the District of Montana erred in holding and deciding that Section 3224, Revised Statutes of the United States, precludes complainant and appellant from relief by injunction.

III.

The Honorable United States District Court for the District of Montana erred in holding and deciding that the charges and assessments described and set forth in the warrant for distraint annexed to the bill of complaint, are taxes and assessable as taxes, and collectible by warrant for distraint, and in dismissing plaintiff's bill of complaint on that ground.

IV.

The Honorable United States District Court for the District of Montana erred in holding and deciding that the charges and impositions mentioned and set forth in Title II, Section 25, of the National Prohibition Act are taxes and may be enforced by sale of complainant's property by warrant for distraint and in dismissing complainant's bill of complaint on that ground.

V.

The Honorable United States District Court for the District of Montana erred in holding and deciding that a sale of plaintiff's property under the levy of a warrant for distraint by the Collector of Internal Revenue for the District of Montana, without any action in court, and without giving the plaintiff a day in court, or opportunity to be heard is not illegal and without authority of law, and is not violative of the Constitution of the United States, particularly the Fifth, Sixth, Eighth and Eighteenth Amendments, and in dismissing plaintiff's bill of complaint on that ground.

VI.

The Honorable United States District Court for the District of Montana erred in holding and deciding that plaintiff's only remedy is that of payment of the tax, and penalty, and suing for a refund of such payment and in dismissing plaintiff's suit on that ground.

VII.

The Honorable United States District Court for the District of Montana erred in holding and deciding that complainant's bill in equity did not state a cause of action entitling plaintiff to the relief sought.

VIII.

The Honorable United States District Court for the District of Montana erred in dismissing complainant's suit on the ground and for the reasons that in law and equity plaintiff is entitled to the relief sought.

ARGUMENT.

I.

SECTION 3224 REVISED STATUTES (COMP. STAT. 5947) ASSUMES THAT A LIABILITY FOR A TAX EXISTS AND ITS OBJECT IS TO PREVENT DELAY OR INTERFERENCE WITH THE COLLECTION OF THE FEDERAL REVENUES. IT WAS NOT ENACTED TO ENFORCE THE PROVISIONS OF A PENAL STATUTE TO ASSIST IN THE ENFORCEMENT OF PENALTIES IMPOSED AS A PUNISHMENT FOR CRIME.

Section 3224 reads as follows:

> "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

The fundamental rule underlying the section is that the government must not be delayed or interfered with in the collection of its revenues. The section in ques-

tion clearly is revenue act; a statute passed to prevent delay in collecting the revenues of the United States. This is clear from the cases wherein the statute has been applied; they relate to such exactions as clearly fall within the definition for taxes, that is, exactions for revenue for the use of the government. Barnes vs. Railroad, 17 Wallace 307-310, 21 L. Ed. 544 (tax on dividends); Snyder vs. Marks, 109 U. S. 189, 27 L. Ed. 901 (tax on tobacco); High vs. Coyne, 178 U. S. 111, 44 L. Ed. 997 (tax on legatees); Dodge vs. Osborn, 240 U. S. 118, 60 L. Ed. 557 (tax on incomes).

A tax, properly speaking, is a burden imposed upon the individual for the support of the government. New Jersey vs. Anderson, 203 U. S. 483-492, 51 L. Ed. 284. It has been defined also as an "enforced contribution for the payment of public expense." Houck vs. Little River Drainage District, 239 U. S. 254, 60 L. Ed. 266.

A penalty, on the contrary, is a punishment for a crime which has been committed. Its essential idea is that of punishment. U. S. vs. Reisinger, 128 U. S. 398, 32 L. Ed. 480; Huntington vs Ttrill, 146 U. S. 657, 36 L. Ed. 1123.

If the fundamental characteristics of a penalty exists, namely, punishment for crime, its character is not changed by the mode in which it is inflicted, whether by suit or criminal prosecution. U. S. v. Choteau, 102 U. S. 603-611. 26 L. Ed. 246.

An examination of Section 35 of the National Prohibition Act, under which the assessment and collection by distraint in this case is laid, will, it is submitted,

clearly show that it provides for a penalty and not a tax. As said in Thome v. Lynch, 269 Fed. 995, 1001:

> "They are for the purpose of punishment and not for the purpose of revenue; * * * they are imbodied in a statute which in its most important features is highly penal in its nature."

In Accordo vs. Fontenot, 269 Fed. 447, at page 450, the court says:

> "Taking up the first question, it is well settled that Congress may impose taxes for the purpose of regulating any business or occupation, if there is the slightest color of raising revenue, and these taxes may be so excessive as to actually prohibit. An example of this is found in the Act of January 17, 1914, (Comp. St., par. 6287a-6287f), imposing a tax of $300 per pound on the manufacture in the United States of smoking opium. Nevertheless, if any one chose to pay the tax, he could indulge in the business. So with the internal revenue taxes, although one might be guilty of a criminal offense by not paying his taxes promptly, still the tax is primarily intended to raise revenue.
>
> On the other hand, the taxes and penalties provided for by section 35, tit. 2, of the National Prohibition Act, lack every fundamental element of a tax. The manufacture and sale of intoxicating liquor for beverage purposes are absolutely prohibited by the Eighteenth Amendment to the Constitution and the National Prohibition Act. Payment of the so-called taxes could not legalize either

transaction, and the section so states. There is not the slightest pretense of raising revenue, and it should not be presumed that Congress intended to levy a tax for the purpose of prohibition on something already prohibited. It is also exceedingly doubtful that it could do so. Cooley on Taxation 3rd. Ed.) p. 12 et seq., verbo "Maxims of Policy."

It is evident the so-called taxes and penalties provided by section 35, tit. 2, of the National Prohibition Act, are simply additional penalties imposed for the violation of a criminal statute, and section 3224, R. S., is no bar to relief in equity in a proper case. See Dodge vs. Brady, 240 U. S. 122, 36 Sup. Ct. 277, 60 L. Ed. 560."

The assessments provided by Section 35 of Title II of the National Prohibition Act, have been held to be penalties and not taxes in the following cases:

Thome vs. Lynch, 269 Fed. 995, 1001;
Accordo vs. Fontenot, 269 Fed. 447;
Ledbetter vs. Bailey, 274 Fed. 375;
Connelley vs. Gardner, 272 Fed. 911;
Ravitz vs. Hamilton, 272 Fed 721.

The only decisions found to the contrary, aside from the Regal Drug Company case, 273 Fed. 182, are Pummeli vs Riordan, 275 Fed. 846, and Kelly vs. Lewellyn, 274 Fed. 108, and the effect of the former decision is greatly impaired by the statement of the court at the end of the decision that the question was not in his opinion free from difficulty and doubt.

The language used by Congress in Section 35 is, in

itself, strongly indicative of its intent to impose a penalty for the commission of a crime, where it provides for the assessment "from the person responsible for such illicit manufacture of sale" a tax "in double the amount now provided by law, with an *additional* penalty of $500.00 on retail dealers and $1,000.00 on manufacturers." Had Congress intended that this assessment was the assessment of a tax, and not a penalty for the commission of a crime, it could readily have used language clearly and conclusively indicative of such an intention. Its failure to do so is in itself strongly indicitive of the nature of the assessment authorized therein, and when considered in the light of the fundalemtal principals above stated it is conclusive.

II.

A PENALTY IS NOT SUBJECT TO COLLECTION BY DISTRAINT.

The remedy for enforcement of a penalty is either by criminal prosecution or by civil suit. 12 R. C. L. 220, 221, U. S. vs. Stevenson 215 U. S. 190, 54 L. Ed. 453.

As was said in Thome vs. Lynch, 268 Fed. 995, 1004.

> "The second question, whether distraint is the proper method of collecting the exactions demanded, has in effect been answered in the foregoing discussion. As shown above, before the Eighteenth Amendment went into effect, the power of the collector of internal revenue to proceed by distraint

was a limited power, limited to taxes proper and certain specified penalties annexed to taxes proper. This limited power in the collector under the internal revenue laws to collect certain penalties by distraint is not enlarged by any provision of title 2 of the National Prohibition Act, but is, on the contrary, curtailed."

"It may be further observed that the preliminary steps provided in section 3172, R. S. (Comp St. par. 5895), and leading up to the notice and demand in section 3184, R. S. all relating to assessment and collection of internal revenue taxes proper, to-wit: The convassing by the collector; the returns by parties liable to the taxes; the call for such returns; the summons by the collector for examination; and, upon refusal, the making of a return by the collector, were never intended and are not suitable as procedure for collection of penalties such as those prescribed in section 35 of the National Prohibition Act. Nor, indeed was the procedure under the sections above mentioned followed in the instant case. Further, that a civil suit is a proper remedy for the collection of these exactions provided for in section 35 of the National Prohibition Act is recognized by the Internal Revenue Department, but the attitude of the department is shown by the following extracts from regulation No. 12, revised October 1, 1920, issued by the department. On page 42 is the following:

"In making reports in prohibition cases, a tax

and assessment penalty imposed by section 35 of title 2 of the National Prohibition Act should not be overlooked. It will often prove more effective to suppress violations of the law than the actual criminal liabilities imposed."

And again, on page 19, is the following:

"Legal preceedings will not generally be commenced until after the remedy by distraint is exhausted."

Title 2, paragraph 28 of the National Prohibition Act confers on the Internal Revenue Commissioner and subordinate officers for the enforcement of the National Prohibition Act the powers which are conferred by law for the enforcement of existing laws relating to the manufacture and sale of intoxicating liquors. Section 28 therefor simply give to the commissioner and subordinate officers the same powers in enforcing the National Prohibition Act as they had under existing laws relating to the subject. These powers include the enforcement by distraint in case of special taxes and also of certain enumerated penalties under certain of the revenue statutes, but as we have seen the exactions under section 35 of the National Prohibition Act are none of then taxes but all penalties so far as they relate to the manufacture or sale of intoxicating liquor for beverage purposes, then it follows that section 28 gives no powers to collect these penalties by distraint. A consideration of the recent cases sustains the above view. Thus in Kausch vs. Moore 268 Fed. 668, the court holds clearly

rant to collect penalties provided by Section 55, and in that no authority exists for the use of a distraint war-Kelly vs. Lewellen 274 Fed. 112,114, the court says:

> "It is hard to conceive of anything more prominently fixed by law as within the jurisdiction of the District Court than the recovery of penalties. The first Judicial Act, passed by Congress on September 24, 1789, gave the District Courts of the United States jurisdiction of all suits for penalties and forfeitures incurred under any law of the United States. That provision has remained the same, and is not found in the ninth paragraph of section 24, Chapter 2, of the Judicial Code, which went into force January 1, 1912, in the following language:
>
> "Sec. 24. The District Court shall have original jurisdiction as follows:
>
> "Ninth. Of all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States." Comp. St. par. 991.
>
> "I am satisfied that Congress has not placed in the hands of the collector of revenue the power to collect, by distress and sale, the penalties provided for in the said section of the National Prohibition Act. This same question has been before courts in other jurisdictions, and decided in favor of the plaintiff where similar bills have been filed. See Accardo vs. Fontenot, Collector of Internal Revenue, 269 Fed. 447, in the District Court for the

Eastern District of Louisiana, where Judge Foster has given the subject grave consideration."

See also the other cases heretofore cited.

III.

THERE IS NO EVIDENCE SUFFICIENT TO AUTHORIZE THE COMMISSIONER OF INTERNAL REVENUE OR THE COLLECTOR OF INTERNAL REVENUE TO MAKE THE ASSESSMENT SOUGHT TO BE COLLECTED HEREIN.

The statute provides that:

"Upon *evidence* of such *illegal* manufacture or sale a tax sholl be assessed against," etc.

It is therefore necessary that evidence of illegal manufacture of sale must be furnished to the commissioner before he has any authority to make the assessment. The term "evidence" in the act must be given its legal meaning. Ledbetter vs. Bailey, 274 Fed. 375, 383.

As said in this case it is elementary that:

"Evidence is intended to describe conditions from which inferences may be logically drawn as to the existence of facts under investigation."

"Evidence is intended to furnish a lead to induce persuasion of the existence or none-existence of facts in issue. It is the physical means by which the belief of the existence of a given fact is created."

"The unsupported reports of officers, such as are described before, indefinite and uncertain as

they may be, and as the notices and liens hereinbefore set out indicate, cannot be evidence such as is contemplated by law, sufficient to establish facts to be used as abasis for a proceeding against either the person or the property of a citizen."

In the present case there was absolutely no evidence in the possession, either of the commissioner of Internal Revenue or the local Collector of Internal Revenue, in any way proving or tending to prove either the manufacture or sale by this appellant of illicit spirits. On the contrary the trial court brushed aside an attempted prosecution of appellant as being entirely unfounded and unwarranted, saying that the mere fact that her husband was engaged in the illicit manufacture of intoxicants could not be held to render her guilty of the offense.

The attempt of the revenue officers to proceed in this case in the arbitrary and unwarranted manner that they have is absolutely without any legal authority under the National Prohibition Act and is a taking of property without due process. The tax was assessed, not upon any hearing, at which, the appellant had opportunity to be heard, but as a result of a secret investigation and report. She was not advised in any way of the matter until the issuance of the notice. Proceedings of this character are well characterized by the United States District Court for the Western District of North Carolina, in Ledbetter vs. Bailey, 274 Fed. 375, 379. In this case the court said:

"Referring again to the reports upon which

these assessments are based, it is an irresistable conclusion, from the character of the notices, the contents of the liens filed, and the manner of assessment, that the information furnished to the taxing authorities in Washington is largely the result of unfounded opinion and alleged facts, exxisting only in the minds of those who have sent in the statements. It is evident that the imaginations of these reporters in many instances have been allowed to take unrestrained flight, and have thereby reached heights inconceivable to the normal mind, and, further, the manner of the execution of the act which we are now considering, by the agencies appointed for its enforcement, has been in many instances such as to trangress the sacred barriers provided by the Constitution for the protection of person and property in this country. The conduct of some of these subordinates has been both arrogant and ruthless, and has reached a degree which has aroused the indignation of many of the best citizens in the land."

"The framers of our organic law undertook to guard against the invasion of the rights of the citizen with respect to the liberty of his person and the sacredness of his home and property and with this end in view provided for trial by jury, for the security of persons, houses, papers and effects against unreasonable searches and seizures, and that the property of a citizen should not be taken without due process of law. Can the proceedings

which have been inaugurated and are being fostered by the federal authorities for the enforcement of the Volstead Act be upheld as due process of law, or in other words can the provisions of the Constitution which undertake to protect property from wrongful seizure, forfeiture, or confiscation be so construed as to permit citizens to be subject to penalties decreed in secret, without notice and without the benefit of a hearing. If so, in my opinion the meaning of the provisions of the Constitution above referred to have been misunderstood by the people.

It is submitted that on account of the lack of evidence to sustain the assessment the attempted assessment upon which all of the proceedings herein sought to be enjoined were based was unauthorized by law and was arbitrary, capricious and without legal justification. In view of the above it is submitted that the decision of the lower court dismissing the bill should be reversed and the case remanded.

Respectfully submitted.

Chas. A. Russell.
Chas. N. Madeen.
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Dan J. Heyfron.
Attorneys for Appellant.

No. 3780

In the United States Circuit Court of Appeals

For the Ninth Circuit

3

SARAH POOL,

Appellant,

vs.

JAMES A. WALSH, Collector of Internal Revenue of Montana,

Appellee.

Brief of Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

Appearances:

JOHN L. SLATTERY, United States Attorney
RONALD HIGGINS, Assistant U. S. Attorney,
W. H. MEIGS, Assistant U. S. Attorney,
Attorneys for Appellee.

No. 3780

In the United States Circuit Court of Appeals

For the Ninth Circuit

SARAH POOL,

Appellant,

vs.

JAMES A. WALSH, Collector of Internal Revenue of Montana,

Appellee.

Brief of Appellee

FOREWORD

The office of a statement of the case is to succinctly present the questions involved, in the manner in which they are raised.

(Rule 24 of this Court.)

Appellant violates the rule by injecting into her statement of the case a recital of alleged facts, (Pp. 4 and 5, Appellant's Brief) which present no possible question within the record; such recital being manifestly intended as a reflection upon the integrity and good faith of

the "federal revenue officers." Such a violation of the plain rule of this court ought to be severely criticized and condemned. Appeals to sympathy, based on statements unsupported by the record, are strangely out of place before a tribunal, whose function, in this case, is to dispose of pure questions of law.

ARGUMENT

In support of the alleged errors assigned, appellant contends for three propositions: One, that Sec. 3224, Revised Statutes of the United States, assumes that a liability for a tax exists, and that the object of the statute is to prevent delay or interference with the collection of the federal revenue, and, hence, does not apply where the provisions of a penal statute are sought to be enforced; second, that a penalty is not subject to collection by distraint; and, third, that there is no evidence sufficient to authorize the Commissioner of Internal Revenue or the Collector of Internal Revenue, to make the assessment sought to be collected herein.

All of these contentions have been disposed of adversely to the appellant by the decision of this court in the case of Regal Drug Company, a Corporation, versus Wardell 273 Fed. 182, decided May 2, 1921. So far as the issues are concerned, that case is identical with the one at bar, and is controlling here.

The appellant's first contention, namely, that Sec. 3224 assumes the existence of a liability for a tax, and is inapplicable where a penalty is sought to be enforced, is thus disposed of in the able opinion of Judge Morrell in Regal Drug Corporation versus Wardell:

"Conceding that the tax is in the nature of a pen-

alty, it does not follow that its collection can be restrained by a suit in equity, if there is a speedy and adequate remedy at law. That there is such a remedy at law can not be seriously controverted."

(Secs. 3220 and 3226, R. S.

And, consequently, the second contention of appellant, namely that a penalty is not subject to collection by distraint, falls.

The third contention of the appellant, namely, that there is no evidence sufficient to authorize the making of the assessment sought to be collected, is untenable.

Sec. 35 of Title II of the National Prohibition Act provides that upon evidence of the illegal manufacture or sale of intoxicating liquor, a tax shall be assessed against, and collected from, the person responsible for such manufacture or sale. The assessment of such tax is purely an administrative function, and whether or not the evidence submitted is sufficient to warrant the assessment of the tax is not subject to review by the court.

Kelly v. Lewellyn, 274 Fed. 108.

The Supreme Court has said, in the State Railroad Tax Cases, 92 U. S. 575, with respect to Sec. 3224, supra:

"The government of the United States has provided, both in the customs and in the internal revenue, a complete system of corrective justice in regard to all taxes imposed by the general government, which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer. *But there is no place in this system for an*

application to a court of justice until after the money is paid." (*Italics are ours.*)

And, in Snyder vs. Marks, 109 U. S. 189, referring to the inhibition of Sec. 3224, supra, it is said:

"The remedy of a suit to recover back the tax after it is paid, is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it."

In Dodge vs. Osborn, 240 U. S. 118, plaintiff sought to enjoin the assessment and collection of certain surtaxes, upon the ground that the statute was void, and repugnant to the Constitution of the United States. A motion to dismiss the bill was sustained, and the court, speaking through Chief Justice White, said:

"This doctrine has been repeatedly applied until it is no longer open to question that a suit may not be brought to enjoin the assessment or collection of a tax because of the alleged unconstitutionality of the statute imposing it." (Citing a number of cases.)

Resuming, the cases above cited demonstrate the certainty that the appellant has an adequate remedy at law; and, (2), that even though such remedy be neither adequate nor speedy, yet, in view of the unambiguous terms of Sec. 3224, supra, her suit may not be maintained.

Respectfully submitted

JOHN L. SLATTERY,
United States Attorney.

RONALD HIGGINS,
Assistant U. S. Attorney.

W. H. MEIGS,
Assistant U. S. Attorney.

In the Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

PARKER STENNICK, Trustee in Bankruptcy for the Hamilton Creek Timber Company, a Corporation, and the Rainier Lumber & Shingle Company, a Corporation,

Plaintiff-Appellant,

vs.

WILLARD N. JONES, FRED A. KRIBS and the J. K. Lumber Company, a Corporation,

Defendants-Appellees.

APPELLANTS' BRIEF.

Appeal from the Findings of Honorable Robert S. Bean, Judge of the District Court of the United States for the District of Oregon on Accounting.

THOMAS MANNIX,
GUY L. WALLACE,

Attorneys for Appellant.
GUY C. H. CORLISS,
Attorney for Appellees.

By permission of the Court I cite the following cases on the points that the creditors are entitled to the two items of proeprrty wherein Dodge took money from Jones and Kribs and did not pay the creditors

In re Winter, 8 Ch. Div. 225;
Hunt, vs. Johnson, 11Wed. 135;
Slater, vs. Oriental Mills, 27 Atl. 443.

In the Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

PARKER STENNICK, Trustee in Bankruptcy for the Hamilton Creek Timber Company, a Corporation, and the Rainier Lumber & Shingle Company, a Corporation,

Plaintiff-Appellant,

vs.

WILLARD N. JONES, FRED A. KRIBS and the J. K. Lumber Company, a Corporation,

Defendants-Appellees.

APPELLANTS' BRIEF.

Appeal from the Findings of Honorable Robert S. Bean, Judge of the District Court of the United States for the District of Oregon on Accounting.

Complainant in the following suit assign the following errors, to-wit:

I.

The Court erred in its judgment and decree wherein and whereby the Court ordered, adjudged and decreed that the complainant was entitled only

to the sum of $7167.77 against the J. K. Lumber Company and not against the other defendants.

II.

The Court erred in failing to follow the mandate and opinion of the Circuit Court of Appeals, the said part of said opinion reading as follows:

> *"The J. K. Company was limited in its rights by the contract and could take no property which belonged to the bankrupts except that which was clearly affected by the provisions of the contract, and which we have said is confined to the property included in the contract. * * * * All property, therefore, which was bought by Dodge out of the* $215,000 *was fairly within the terms of the contract and became subject to forfeiture. But other property not purchased out of such fund, and not attached to the realty should rightfully pass to the Trustee.* * * * * *
>
> *"As it would be more practicable that an accounting should be had before the District Court which did not allow in favor of the Trustee any account for the value of any personal property taken by defendants, not bought with any of the* $215,000 *heretofore referred to, we think this case should go back to the District Court, etc."*

III.

The Court erred in failing to abide by the following part of the opinion of the Circuit Court of Appeals:

> *"With respect to personal liability of Jones and Kribs our opinion holds that they being parties to the suit and being sued as joint tort*

feasers, are liable individually for any property which they or either of them may have taken in their individual capacities and that the accounting should be had against them as individuals as well as against the J. K. Company,"

IV.

The Court erred in refusing to allow compensation for the following items of personal property converted by the defendants, Jones and Kribs, in their individual capacities on May 12, 1914, and none of which items were paid for by any part of the $215,000.

Shea Engine on hand May 12, 1914	$ 3704.86
Boomsticks on hand May 12, 1914	4951.58
Steam Pond Saw on hand May 12, 1914	302.48
Iron Utensils, etc. (Stewart Bros.) on hand May 12, 1914	1048.51
Wire Rope (Broderick & Bascom) on hand May 12, 1914	4636.01
Cross Cut Saws (Simonds Mfg. Co.) on hand May 12, 1914	164.18
Steel (Neumeyer & Dimond) on hand May 12, 1914	1312.59
Locomotive Equip., etc. (Hofius Equpi. Co.) on hand May 12, 1914	293.63
2 35-Ton Norton Jacks (Ry. Equip. Co.) on hand May 12, 1914	250.25
Bagley Scraper (Beebe) on hand May 12, 1914	150.00
Yarder Engine (Willamette Iron Co.) on hand May 12, 1914	2600.00
Donkey Engine Supplies (Will. Iron Co.) on hand May 12, 1914	407.91
13 Trucks (Seattle Car & Foundry) on	

hand May 12, 1914	6342.08
Steel Rails unattached and in bulk on hand May 12, 1914	9094.21
Ties not attached and piled up on hand May 12, 1914	1680.00
Lumber on hand May 12, 1914	1287.89
Logs sold by Cox from McRae Land on hand May 12, 1914	820.00
Logs stored in slough on hand May 12, 1914	483.07
Iron Supplies and Utensils (Marshall-Wells)	4095.26
Powder on hand May 12, 1914	937.54
Groceries, Shoes, etc., on hand May 12, 1914	2565.93
Tank Fixtures, Push Car, etc. (Fairbanks-Morse Co.) on hand May 12, 1914	154.75
Oil Burner (Logger Oil Eq. Co.), on hand May 12, 1914	450.00
51 gals. Oil (Rasmussen & Co.), on hand May 12, 1914	25.57
Fuel and Lubricating Oil (Standard Oil Co.) on hand May 12, 1914	179.77
Horse on hand May 12, 1914	75.00
Bridge Iron on hand May 12, 1914	464.13
Bunkhouse movable and unattached, on hand May 12, 1914	1200.00
Flat Car on hand May 12, 1914	985.00
Ballast Car on hand May 12, 1914	487.15
Track-laying Car on hand May 12, 1914	133.59
Office Fixtures on hand May 12, 1914	300.00
Total	$51583.74

V.

The Court erred in failing to allow the motion of the complainant that this case should be submitted to a master for the reason that the books of account show the disposition of the $215,000, no part of which was used for the purchase of any of the items set forth in the above assignment of error. The complainant proved his case by showing that the aforesaid items of personal property had not been paid for at all, and the evidence of this fact consisted of the approved claims for the said property, which claims were obtained from the bankruptcy court; the approved claims being uncontradicted evidence that no part of the $215,000 had paid for any of the aforesaid property, and the books of account which were not gone into by the Court show that the $215,000 was used in constructing the railroad bed and completing the railroad. The disposition of the $215,000 is shown by the requisitions of the Chicago bond house in evidence.

VI.

The Court erred in finding that no personal liability attached to Jones and Kribs for taking any part of the aforesaid property, especially in view of the fact that it was admitted at the trial that the J. K. Lumber Company is now a defunct concern and has no assets.

1. This case was sent back from the Circuit Court of Appeals for an accounting. The account-

ing was had before Judge Robert S. Bean. The Court was asked to appoint a master to conduct the hearing, but this was refused. The Court awarded the plaintiff the sum of $7167.77 against the J. K. Lumber Company, but exonerated Jones and Kribs individually from all liability. The matter of the personal liability of Jones and Kribs was the subject of a rehearing before the Honorable Circuit Court of Appeals and the decision handed down in connection with this individual liability of Jones and Kribs reads as follows:

> *"With respect to personal liability of Jones and Kribs our opinion holds that they being parties to the suit and being sued as joint tort feasors, are liable individually for any property which they, or either of them, may have taken in their individual capacities, and that the accounting should be had against them as individuals as well as against the J. K. Company."*

The testimony about Jones' and Kribs' liability is as follows:

Hugh L. Cox testified on page 108 that he went on the ground on or about the 12th of May, 1914.

QUESTIONS BY MR. CORLISS:

Q. Did Mr. Jones as an individual, or Mr. Kribs as an individual have anything to do with that contract?

A. Why, they both had something to do with it as the J. K. Lumber Company.

Q. I mean were they parties to it personally or only as officers of the J. K. Lumber Company?

A. Well, it was signed by Mr. Jones and Mr. Kribs as the J. K. Lumber Company, as I remember the contract. I did, of course, all my business with Mr. Jones and Mr. Kribs, and of course they called themselves the J. K. Lumber Company, but whatever that company consisted of anybody else besides them or not, I don't know anything about it.

On cross-examination on page 120 Cox testified that he went up there on the 12th of May, 1914; that he had charge of everything there for a year and a half; that he talked with Jones and Kribs personally before going up there.

Q. And they directed you to go up there, didn't they?

A. Yes.

Q. And whatever you did up there you did pursuant to a talk you had with Mr. Jones and Mr. Kribs personally?

A. Well, done in pursuance to a contract signed with them.

Q. Well, whatever you did up there, I say, you did pursuant to your talk with Jones and Kribs?

A. And their contract.

Q. And they instructed you to take charge of it?

A. Well, they turned it over to me. * * * * * *

Q. The point I make, Mr. Cox, is that all your talks and all your going up there was due to your talks with Jones and Kribs individually?

A. Yes.

Q. And they directed you to go up there and take possession from Mr. Babcock?

A. Yes, they were to turn the stuff over to us; we were not to have any scrap with Mr. Babcock at all; they were to turn it over.

Q. They told you that Mr. Babcock would turn it over peacefully?

A. Yes.

Q. That is Jones and Kribs?

A. Yes, and Mr.—I don't know—this lawyer, Nash is it? He also told us that Mr. Babcock had instructions to turn it over peacefully, and all we had to do was to go up there and take it over. He was Mr. Dodge's lawyer.

Q. Then you went up there and took it over pursuant to your talk with Jones and Kribs?

A. Yes.

Q. They directed you to do it?

A. Yes.

Again on page 120 Cox testified:

Q. Apart from Jones and Kribs you had no dealing with the J. K. Lumber Company, did you? * * *

A. That is all I came in contact with.

Jones and Kribs were directors of the J. K. Lumber Company. Kribs was president and Jones was treasurer. On page 158 Jones testified as follows:

Q. And it was understood by you and Kribs that they (Cox and Armstrong) were going to go up there?

A. Yes.

Q. And take all the stuff up there? A. Yes.

Q. And that was the undertsanding between you?

A. That was the contract and understanding.

On page 139 Jones testified that at the time the property was taken over he knew that creditors had claims against the property but he had no way of making investigation to find out what these claims were.

On page 2672 of the original testimony Mr. Jones on cross-examination said:

Q. You have all of them (the property) in your possession at the present time?

A. At the present time we have possession of all of that property. We had to take it over because we were facing a condition in which it was absolutely necessary for us to take it over, and we are willing to return it

On page 176 of the Record Judge Corliss, who was attorney for Jones and Kribs, admitted that he drew the notice of forfeiture which is part of the pleadings in this case and under which all the property is claimed to be owned under the forfeiture clauses of the contract.

At the trial of this case in January, 1918, Mr. Jones on his cross-examination testified as follows:

"I am the treasurer of the J. K. Lumber Company. Kribs has been the president of it. It was organized for the purpose of carrying out this contract. We have control of it between us. We own the whole thing."

Q. And when the property was taken over the

12th of May, who was it determined it should be taken over? Was it you or Mr. Kribs, or both of you together?

A. Well, there was discussion as to what action should be taken, and between us we determined that that was the action to be taken.

And in the examination of Cox in January, 1918, the following testimony was given (page 403, et seq.):

Q. At the instigation of Jones and Kribs you made a contract with them, did you not?

A. Yes, sir. They sent their own man up there, Mr. Lilly, and made an inventory of the stuff and we had a right to use anything that they had taken over in connection with our contract. We took possession of everything they gave us possession of and Jones and Kribs have had possession ever since. I have been in their employ since March, 1915. I am superintendent of their logging operations up there. They pay me $250.00 a month. I am cutting the timber up in Hamilton Creek. *Jones and Kribs are selling the logs.*

The foregoing testimony shows that Jones and Kribs owned and controlled the J. K. Lumber Company and that they took all this property over under claim of ownership. The claim now that Jones and Kribs are not individually liable is mere subterfuge to escape liability. The J. K. Lumber Company has gone out of existence and is completely bankrupt and naturally Jones and Kribs are very indifferent as to any judgment that may be declared against the

J. K. Lumber Company, and if they can evade liability by claiming that their corporation and not they themselves converted this property they will have achieved a victory because any judgment against the J. K. Lumber Company would be uncollectible.

The law is well-settled that joint tort feasors cannot escape liability because one of them happens to be a corporation. Anyone who participates in a tort is liable for the tort and it is absurd for one committing the tort to say he did not commit it, but the corporation did. If that proposition were true, every tort feasor in the world could escape liability by incorporating himself as Jones and Kribs did in this case. Just how Jones and Kribs propose to evade their responsibility for the conversion of the property by putting the blame on the J. K. Lumber Company is difficult to understand. Jones and Kribs owned the J. K. Lumber Company; they managed the J. K. Lumber Company and the J. K. Lumber Company could function in no way except through Jones and Kribs. When it was determined to take over all the property of the bankrupts, in whose mind did the scheme originate and whose mouth gave the direction? Everything that was done was done by Jones and Kribs so far as the conversion of this property is concerned and they cannot escape liability now by saying they did it for the J. K. Lumber Company. It does not matter for whom the conversion was made, the perpetrators of the conversion are liable.

A conversion constitutes a trespass, and Jones and Kribs became trespassers by converting this property and they cannot escape liability for their trespass by trying to put the blame on their defunct and bankrupt corporation. The cases are unanimous in holding that the officers and agents of a corporation are liable for torts in which they directly participate.

Jones and Kribs took the property in their "individual capacities" when they directed Cox & Armstrong to go upon the ground and take possession. It did not make any difference whether by taking this property Jones and Kribs intended to benefit the corporation or intended to benefit themselves. The tort attached and the liability was created by the taking and not by the intention. Of course, Jones and Kribs intended to benefit themselves because the corporation was their own and merely an instrument for the carrying on of their business. We do not know of any rule of law which allows the commission of a tort for the benefit of somebody else.

Circuit Judge Hunt, the writer of the opinion in this case in the Circuit Court of Appeals, at one time held the directors of a corporation liable for an explosion of gunpowder unlawfully stored by the corporation though they had no knowledge thereof, if by the exercise of ordinary care and diligence they could have known of the dangers attendant upon the storage of such explosives.

See Cameron v. Kenyon-Connell Com. Co., 22 Mont. 352 and note.
74 Am. St. Rep. 602.

In Nunnelly v. Southern Iron Co., 94 Tenn. 397; 28 L. R. A., at page 429, the Court said:

"When a person enters into a contract with a corporation, through its agents or officers, fairly and in good faith, there can, under no circumstances, any liability attach to such agents or officers in respect to the contract, unless so stipulated. In such a case the person gets just what he bargained for—a liability against or a contract with a corporation alone. But the torts or wrongs of corporations through its agents or officers are governed by an entirely different principle of law. If the agent of a corporation or of an individual commits a tort, the agent is clearly liable for the same; and it matters not what liability may attach to the principal for the tort, the agent must respond in damages if called upon to do so. This principle is absolutely without exception and is founded upon the soundest legal analogies, and the wisest public policy. It is sanctioned by both reason and justice, and commends itself to every enlightened conscience. To permit an agent of a corporation, in carrying on its business, to inflict wrong and injuries upon others and then shield himself from liability behind its vicarious character, would often both sanction and encourage the perpetration of flagrant and wanton injuries by agents of insolvent and irresponsible corporations. It would serve to stimulate the zeal of responsible and solvent agents of irresponsible and insolvent

corporations in their efforts to repair the shattered fortunes of their failing principals upon the ruins of the rights of others. Says Mr. Morawetz: "The agents of a corporation are clearly liable for their tortious acts. They are therefore liable for any injury to the property of others.....and the liability is entirely independent of any liability which the company may have incurred."

See also Nat. Carbrake & Shoe Co. v. Terre Haute Car and Mfg. Co., 19 Fed. 514.
Morrison v. Blue Star Nav. Co., 67 Pac. 244.
Greenburg v .Whitcomb Lbr. Co., 90 Wis. 225; 48 Am. St. Rep. 911 and note.
Tyler v. Savage, 143 U. S. 79; 36 L. Ed. 82.
Bingham v. Lipman, Wolfe & Co., 40 Ore. 363.
Solomon v. Bates, 118 N. C. 311; 24 S. E. 478.
Ullman v. Hannibal, etc., Ry. Co., 67 Mo. 178.
Rem. on Bank, 2nd Ed., Sec. 1225.
In-re Burkowitz, 173 Fed. 1012.
York v. Brewster, 174 Fed. 566.
In-re Holbrook Leather Co., 165 Fed. 973.
Peters v. Union Biscuit Co., 120 Fed. 679 at 686.
Estes v. Worthington, 30 Fed. 465.
Savelhmer v. Eisner, 140 Fed. 938.
In-re Rieger, 157 Fed. 609.
Salt Lake, etc., v. Collins, 167 Fed. 91.
38 Cyc. 483.

In Rauch v. Brunswig, 137 S. W. 67, the Court said:

In speaking of the manager of the corporation the evidence shows that notwithstanding he

did not handle the fund in person in the first place, yet when it was deposited it was under his exclusive control, as he was the sole manager of the corporation. He knew that the money did not belong to his corporation but notwithstanding such knowledge he applied it to the payment of its debts. This was an act of conversion. But we are met with the argument that he was acting in the capacity of agent and not personally liable; therefore he was not guilty of conversion. If such is the law, the agent of a corporation could shield himself from liability from almost every kind of wrong, provided he was acting in the capacity of agent, notwithstanding the circumstances would render the principal liable for the tort. It is held that the agent is liable to a third party for misfeasance and for acts of postitive wrong. * * * *It is immaterial whether the appellant was acting as agent or not, the conversion was a tort and he rendered himself liable by reason of his tortious act."*

In Lytle Logging & Mercantile Co. v. Humptulips Driving Co., 111 Pac. 774, Judge Rudkin held:

"In an action against a corporation and its president and general manager for trespass in cutting timber from plaintiff's land, an instruction that the president was not individually liable if he acted in good faith as an officer of the corporation and not with the wilful intent to commit a trespass on plaintiff's land, was erroneous under the rule that the master and servant are jointly liable for the torts of the servant."

2. The foregoing property set forth in the assignment of errors was taken over by the defendants on the 12th of May, 1914, and the decision by His Honor Judge Bean was rendered on the 10th of January, 1921, six years later. Judge Bean said in his opinion:

> *"There is no testimony by which the Court can segregate the several items so as to ascertain and determine what ones, if any, were on hand and taken possession of by the defendants in May,* 1914, *or the value thereof."*

We submit that Judge Bean was entirely in error in coming to this conclusion.

H. J. BABCOCK was the manager of the Hamilton Creek Timber Company during the years 1913 and 1914 and had the opportunity to determine what materials had been brought on the ground by the bankrupts. He had been in the lumber business all his life and engaged in the manufacture of lumber and had considerable experience with machinery used in connection with logging timber and had been familiar with such machinery and materials that were on the ground for 15 years and knew the value of such materials (page 2 Transcript). Before Judge Kavanaugh it also appeared that he had been two years in the Scientific School at Yale University and six months in the engineering department at Stanford University (page 1839). This long experience gave him unusual qualities as an expert.

Babcock also knew the value of boomsticks and had been dealing with boomsticks for 12 or 15 years. (Ev., page 7.)

Babcock took an inventory of all the personal property that was owned by the Hamilton Creek Timber Company on the ground on or about the 12th of May, 1914. He made a complete inventory and this enabled him to testify as to all the material on the ground and its value.

On page 31 of Babcock's testimony he testified that he had technical knowledge of the property because he figured out the values himself and spent a good deal of time on the work. He testified that he was familiar with every detail of the inventory.

ARTHUR L. LENDHOLM testified that he was the cashier and accountant and checked materials used at Hamilton Creek. When the goods came in he took the bills and checked the material up with the bills as to quantity and then ascertained whether the price was a fair price by comparing it with the price book usually made use of in such computations. He checked over all the items. He is an expert in this line of business as appears from his testimony on page 61. He was on the job in the year 1913 and 1914 up until March. He took an inventory of the property (Plaintiff's Exhibit 20) in the latter part of January, 1914 (page 69) and checked the materials on the ground personally and put a value upon them.

Mr. Babcock was also called in connection with Lendholm's inventory made on the 24th of January,

1914, aforesaid, and testified that all the materials mentioned in the said inventory were on the ground on the 12th of May, 1914 (page 80). He further testified on page 83 that all the articles set forth in plaintiff's exhibit 20 were itemized by the invoices introduced in evidence.

Between the time that his inventory was taken on the 26th of January, 1914, and the 12th of May, 1914, nothing was done except shoveling out slides and the shoveling out of the slides did not require any use of materials, except picks and shovels. There were no operations that would destroy or diminish any of the materials from the, 26th of January, 1914, to the 12th of May, 1914, and the nature of the property was such that without use there would be no deterioration in a period of two or three months. Babcock was on the ground all the time (page 85). Operations practically ceased at the time Lendholm left.

In addition, an inventory taken by Lilly, the agent and servant of Jones and Kribs made on or about the 12th of May, 1914, was also introduced in evidence, the said inventory being complainant's exhibit 21. In addition the original invoices of the property sold by Stewart Brothers, Broderick & Bascom, Simonds Manufacturing Company, Neumeyer & Dimond Company, Hofius Equipment Company and other vendors were submitted in evidence. Babcock and Lendholm both testified that these articles were on the ground and unimpaired in value at the time of the conversion and

their evidence is further corroborated by Lilly's inventory, who as already pointed out, was the agent for Jones and Kribs.

Under these circumstances to say that there is no evidence of the conversion of this property or its value on the 12th of May, 1914, amounts to a complete ignoring of the foregoing evidence, and it might be added that the record contains not a shred of evidence contradicting the foregoing evidence of the plaintiff.

To prove that the foregoing property was not purchased with any part of the $215,000 the original record of the disbursements of the $215,000 was submitted in evidence as complainant's exhibit 1. In addition to this copies of vouchers in possession of the Continental & Commercial Trust and Savings Bank were also furnished. So that the entire record of the disbursement of the $215,000 is accounted for, and except in one or two instances none of the property mentioned above was charged against the $215,000. In the one or two instances referred to Dodge collected the money but used it for his own purposes and that will raise the question whether or not such items can be said to have been paid for out of the $215,000. These items will be pointed out in this brief later. The $215,000 was disbursed at different periods during the year 1913 ending with November 1st. So that any of the above property acquired by Dodge after the 1st of November could not have been purchased out of the $215,000.

We will now take up the items which we claim Judge Bean should have allowed:

The following items were all converted by the defendants on the 12th of May, 1914, and were not paid for out of the $215,000.

STEAM ENGINE $3704.86

Sold by the Hofius Equipment Company to the Hamilton Creek Timber Company, total contract price was $11704.86, conditional bill of sale, title remaining in the Hofius Equipment Company until paid. This $3704.86 was paid by the Hamilton Creek Timber Company out of its own funds or the funds of its creditors and was not charged to the $215,000 and no part of the $215,000 was used in the payment of the said $3704.86.

Babcock testified that the Shea engine was on the ground on the 12th of May, 1914, and was taken over by Jones and Kribs. (See Test., page 3.) This engine was purchased on a conditional sale contract (page 5). The Shea engine was in good condition. It was a 60-ton Shea engine. There was no requisition made by Dodge on the $215,000 for the $3704.86 paid on this engine. This amount came out of the bankrupt corporations and this $3704.86 represented the equity in the said engine.

H. L. Cox testified on page 110 that this Shea engine was on the ground. He also testified that Jones and Kribs obtained the use of this engine by making arrangements with the vendors after the conversion.

The rule is well settled that a conditional vendee, even after condition broken, can maintain trover for the conversion of personal property. The bankrupts having possession of this engine and being conditional vendees thereof can recover the value of the equity.

Harrington v. King, 121 Mass. 269 and cases cited in 1917 L. R. A.

In Harrington v. King, supra, it is expressly held that a conditional vendee after condition broken may recover as against a trespasser.

BOOMSTICKS $4951.58

This item consists of 17 sets of boomsticks which amount to 425 sticks and chains at $9.00 each, total, $3825; boat, $600.00; boomhouse on raft, $300.00; swifters, $226.58, making a total of $4951.58. These boomsticks were not paid for out of the $215,000 and were not charged against the same by Dodge and were the property of the Hamilton Creek Timber Company.

These boomsticks were taken over on the 12th of May, 1914. (Ev., page 7.) These boomsticks belonged to the Hamilton Creek Timber Company. They were carried as an asset on the books of the company and were put on the books March 31, 1914. (See Vaughan's Test., page 99.) These boomsticks were all itemized in Babcock's testimony (see pages 7 and 8.

Hugh Cox testified on direct examination, page 11, that these boomsticks were taken over on May 12, 1914.

On page 39 Babcock testified that these boomsticks were practically all new sticks, and these boomsticks having been taken over on the 12th of May, 1914, and the inventory having been taken at that time and Babcock having testified to the reasonable value thereof, the evidence on these boomsticks is conclusive.

These boomsticks were not included in the $215,000 as the requisitions will show. These boomsticks were also set forth in the Lilly inventory (complainant's exhibit 21).

STEAM POND SAW.....$302.48

This was bought of the Multnomah Iron Works on the 26th of January, 1914, and was the property of the Hamilton Creek Timber Company and was not charged to the $215,000 fund, or paid for out of the $215,000 and is an aproved claim in favor of the Multnomah Iron Works.

Babcock testified that this pond saw was taken over on the 12th of May, 1914. The bill for this shows that this was not paid for out of the $215,000 (see page 11). Both Lendholm and Babcock testified as to the value of the pond saw. On cross-examination Babcock testified that this pond saw was there when he left on the 12th of May, 1914.

On page 115 Cox testified that this pond saw was shipped back after the conversion by one of the agents for Jones and Kribs, to-wit, Lilly, who made the inventory for Jones and Kribs. Obviously, whatever happened after the property was converted

would not be an excuse for the conversion. With the pond saw, and taken over at the same time, was a six-horsepower boiler and six feet three-quarter copper hose compresser. These items are set forth in Exhibit 2 and were identified both by Lendholm and Babcock.

STEWART BROTHERS ——————— $1048.51

This item consists of hooks, skidding tongs, blocks and other machinery as set forth in the invoices attached to the claim which was filed in the Bankruptcy Court against the Hamilton Creek Timber Company. This was not paid out of the $215,000 or charged against it.

This claim as itemized in the account consists of the following articles:

12 Only 1¼ Choker Sockets.
12 Only 1¼ Peters Choker Hoods.
12 Only 1½ Clevises.
12 Only 1¼ Choker Sockets.
4 Only No. 91 Stewart Trip Blocks Mang. Sheave Line Guard.
2 Only No. 142 Stewart Trip Blocks Mang. Sheave Line Guard.
4 Only No. 1122 Stewart Yarder Blocks Mang. Sheave Line Guard.
1 Reel Wire Rope.
10 Steel Blocks.
6 Only 1¼ Choker Sockets.
2 Only 2¼ Taylor Butt Hooks.
2 Only 1¼ Choker Hoods.
2 Pair 2-in. Octagon Giant Skidding Tongs.
1 Only Trolley.
14x2½x3 Pins.

3 14x2½x3 Manganese Sheaves.
2 Pieces ⅜ Boiler Plate 28x46.
3 3½ Pins.
3 Stewart Oil Cups.
1 2-in. Pin.
2 1¼-in. Pins.
6 Lock Washers.
3 2-in. Full Nuts.
3 2-in. Half Nuts.
1 Box Peerless ⅜-in. H. P. Square Spiral, package 2½ lbs.
1 Box Peerless ½-in. H. P. Square Spiral, package 1⅜ lbs.
1 Box Peerless ⅝-in. H. P. Square Spiral, package 22⅛ lbs.
3 Only 8x2x2½ Mangenese Sheaves.
3 Only Special Pins as per sketch.
4 Only No. 10 Warren Swivels.
12 Only 1½ Clevises made large enough for butt hook 2½-in. to enter tool steel pins furnished.
8 Only 10-in. Stewart Parding Block.
4 doz. 4½ lbs. Stewart Cal. Rev. Axes Sager.
4 doz 36-in. Axe Handles O. H.
2 Only Waterhouse Butt Hooks.
6 Only Hooks for 1¼ Peters Hooks.
4 Only 1/14 Peters Choker Hooks.
3 Only No. 91 Trip Block with Guards.
2 Only No. 1130 Shackle Ydg. Blocks.
8 Only No. 91 Trip Blocks.
2 Only No. 142 Trip Blocks.
1 Only No. 1000 Lead Block.

Babcock testified on page 11 that these items enumerated above were taken over on the 12th of May, 1914, and that the reasonable value of the said

above articles was $1048.51. He also testified that this property was stored in the commissary and had never been used. (Page 12.)

Lendholm testified that he checked all this stuff over prior to February, 1914, except $150.00 worth which came in after February.

BRODERICK & BASCOM—WIRE ROPE..... $4636.01

This company has a claim against the Hamilton Creek Timber Company for items set forth in the inventory, which claim has been approved. This was not charged against the $215,000.

The items of the wire rope are set forth in plaintiff's Exhibit 4 and the sizes and quantities of wire rope sold by this company was stated item by item and the cost of this rope was $4636.01.

Babcock testified on page 12 that his wire rope was taken over on the 12th of May, 1914, and testified that the sum of $4636.01 was a reasonable value of the wire rope taken over at that time.

This item of wire rope is further set forth in Lendholm's inventory (complainant's exhibit 20), where the cable on the donkey engines is designated as old cable and the cable in the commissary is designated as new cable. The total value of this cable is given in Lendholm's inventory as $4752.

There is no denial of the fact that this cable was on the ground and there is no evidence to contradict the evidence of its value.

SIMONDS MANUFACTUR'G CO.—CROSS-CUT SAWS $164.18

These items are set forth and attached to the approved claim and were delivered to the Hamilton Creek Timber Co. from the 19th of December, 1913, to the 10th of January, 1914. They were not paid for out of the $215,000.

These cross-cut saws consist of the following items:

6 7-ft. Cross-Cuts.
2 doz. 7in. Cross-cut Files.
8 7½-in. No. 513 Cross-cut Saws.
12 7-ft. No. 503 Cross-cut Saws.

Babcock testified that the reasonable value of these saws was the same as the cost price, to-wit, $164.18. Their value was very near what they cost as they were not used much. (Test. 13.)

These saws are included in the Lendholm inventory (Com. Ex. 20).

NEUMEYER — DIMOND C.....$1312.59

Bill of steel sold on the 5th of November 1913 to the Hamilton Creek Timber Co. This bill of steel was not paid for out of the $215,000 and is an approved claim. (Note the last of the $215,000 was paid over to Dodge the early part of October, 1913, and anything sold after the early part of October, 1913, could not have been paid for out of the $215,000.)

This claim consists of the following articles:
3 Bars 1¼x4-in. Choker Hook Steel.
3 Bars 2¼-in. Rd. Bull Hook Steel.
2 Bars 1¾-in. Oct. Loading Hook Steel.

2 Bars 1¼x2¼-in. R. E. Loading Hook Steel.
2 Bars 1⅛x2½-in. R. E. Swamp Steel.
1 Bar 1x2½-in. R. E. Grab Swamp Steel.
3 Bars 2½-in. Rd. Block Swamp Steel.
3 Bars 1½x2½-in. Cross Head Steel.
3 Bars 1x3½-in. Bucking Wedge Steel.
3 Bars 1x3-in. Falling Wedge Steel.
1 Bar ⅞-in. Rd. Friction Pin Steel.
1 Bar 1-in. Rd. Friction Pin Steel.
1 Bar 1¼-in. Oct. Marlin Spike Steel.
6 Bars 1-in. Rd. Link Steel.
6 Bars 1¼-in. Rd. Link Steel.
6 Bars 1⅛-in. Rd. Cold Shut Steel.
2 Bars 5/16x5-in. Spring Board Steel.
2 Bars 1¼-in. Rd. Clevis Steel.
2 Bars ⅝-in. Oct. Cold Chisel Steel.
2 Bars ¾-in. Oct. Cold Chisel Steel.
2 Bars ⅞-in. Oct. Cold Chisel Steel.
2 Bars 1½-in. Sq. Cold Chisel Steel.

This item is included in the Lendholm inventory (complainant's exhibit 20) and also in the Lilly inventory (complainant's exhibit 21).

Babcock testified that the reasonable price of this steel was the purchase price, to-wit, $1312.59, and said on page 14: "Naturally, they didn't depreciate any; it was steel for making hooks and logging equipment."

There is no question about the value of this steel.

HOFIUS EQUIPMENT CO.....$293.63

Various tools, instruments, parts necessary for locomotive equipment. These items are set forth in the approved claim therefor and consist

of items from the 3rd of October, 1913, on. This claim was not charged against the $215,000, or was not paid out of it.

These items consist of parts for engine and were testified to be worth the cost price. Babcock could not see any reason for depreciation. (Page 14.)

These parts are set forth in the Lilly inventory and in the Lendholm inventory (plaintiff's exhibits 20 and 21).

There is no dispute about these articles being taken over and there is no dispute about their reasonable value. The enumerated list of the articles are among the exhibits.

RAILWAY EQUIPMENT CO.....$250.25

This item consists of two 35-ton high-speed Norton Jacks and were bought on the 16th of December, 1913, and were not charged against the $215,000 or paid out of it and is an approved claim.

These Norton jacks are both in the Lendholm inventory and the Lilly inventory. Babcock testified that both of these jacks were in first-class condition and were worth the price of new jacks (page 14). Cox corroborated this evidence.

GERALD E. BEEBE $150.00

2½-yd. Bagley Scraper, purchased January 24, 1914, and shipped to the Hamilton Creek Timber Company. This was not requisitioned or paid for out of the $215,000.

Babcock testified that the reasonable value of this machine was the same as the cost, as it had not

been used at the time it was taken over. (Page 14.) He testified that it laid by the depot where it was put off the train. It was in just the same condition it was when delivered there. There is no evidence to contradict the value of this machine.

WILLAMETTE IRON & STEEL CO...$2600.00

1 Yarder Engine 11x13 sold to Hamilton Creek Timber Company. $1300 was paid by the Dodge interests and the entire amount of $3900, purchase price, was charged to the $215,000, but the difference between $1300 and $3900, that is, $2600, was converted by Dodge to his own use. The creditors have a claim against this engine for $2600.00.

The title to this yarder was in the Hamilton Creek Timber Company, but only $1300 had been paid on it, leaving a balance due of $2600.00. With respect to its reasonable value at the time of the conversion Babcock testified it was brand new and worth exactly as much as it was when shipped up there, namely, $3900.00.

H. L. Cox testified that this yarder was in perfect condition when it was taken over (see Record, page 402).

The only claim that Jones and Kribs could have on this yarder was to the extent of $1300 paid by Dodge. The unpaid balance of $2600 should be paid as only $1300 came out of the $215,000, the balance being purchased upon credit of the Hamilton Creek Timber Company, and for which sum claim has been filed and approved in the bankruptcy proceedings.

WILLAMETTE IRON & STEEL CO..$407.91

Consisting of donkey engine supplies. Out of this amount $131.81 was charged to the $215,000, but was not paid. The entire bill for these items is an approved claim and this property was taken over by Jones and Kribs.

The articles composing this claim are as follows:

Parts for Scraper:
Renew Cutting Blade.
Renew 5 Digger Teeth.
Renew 2 Reinforcing Straps.
Renew Reinforcing Bar on R. H. Bottom Side.
Haul Back Lug.
1 Screwed Throttle Valve, complete tested.
2 Friction Operating Shaft Crackets, B-2100.
2 8x20 Rolls A-3562, A-4303.
1 Set Grates for 65-in. Circ. Boiler 10, A-4325.
1 H. H. Plate and Crab 3¼x4½.
2 14-in. Comb. Yard and Road Spools.
1 D. E. 1 Beam Separator for Engine No. 8779, B-139.
2 Stub Ende 2-in. Dia. 10-in. of Thread.
1 Set Dead Plates for 66-in. Circ. Boiler 2 B-4443, 2 A-4327.
New Shaft.
Assemble Parts.
I Cross-head Slipper, A-3711.

Babcock testified that these items were on the ground and were taken over on the 12th of May, 1914, and that their reasonable value was the same

as their cost value, to-wit, $407.91. (See evidence, page 16.) These articles are included both in the Lilly inventory and the Lendholm inventory.

SEATTLE CAR & FOUNDRY CO.....$6342.08

13 trucks. These trucks were sold to the Hamilton Creek Railroad Company. The first invoice being on the 10th of July, 1913, the second invoice being on the 27th of September, 1913. There is a balanec due on these trucks of $5742 unpaid and in addition $600.08 freight. All these trucks were charged against the $215,-000.00 and Dodge collected the entire amount but did not pay for the trucks.

These 13 trucks must not be confused with 17 other trucks purchased on conditional sale. We are not making any claim for the 17 trucks but only for the 13 trucks involved herein, title to which passed to the Hamilton Creek Timber Company and which were converted on the 12th of May, 1914.

This is another case of where Dodge collected the money but did not pay for the trucks, leaving an unpaid balance of $6342.08, which is a filed and approved claim.

Following the rule laid down by the Circuit Court of Appeals that only property which was bought out of the $215,000 could be taken over by Jones and Kribs they are bound to pay for property which was not so bought, and these trucks not having been paid for to the extent of $6342.08, and the insolvent estate having been damaged to that extent, it is the duty of Jones and Kribs to pay that amount to the trustee in bankruptcy because

Jones and Kribs cannot, as already pointed out, charge the misappropriation of funds by their agent to the insolvent estate.

Babcock testified that all the trucks were in good condition, except one. He said he remembered one was smashed up—badly broken and was in the shop to be repaired. The rest of them were all practically new. He said I think they were worth as much as new. (Ev., page 17.)

RAILS ALLOWED BY CIRCUIT COURT OF APPEALS ON PETITION FOR REHEARING MARCH 10, 1919, AS NOT BEING INCLUDED IN THE CONTRACT..... $9094.21

Babcock testified that there was a mile and three-quarters of steel rails. Babcock testified that these rails were worth $34 per ton and their total value about $9000 when they were taken over on the 12th of May, 1914. There is no dispute about the value of the steel rails and Cox admitted in his testimony that there was a mile and three-quarters of rails taken over. (Page 400 of Record.)

He said: "In constructing this mile and three-quarters in 1914 we used the rails that were on the ground and the ties, with the exception of about 550, which we bought. All the other material that we used was on the ground and had been previously purchased, with the exception of quite a quantity of spikes, about 20 kegs, might be 15 or 25. We purchased three switch joints. Outside of that, all the material that we used, with the exception of the timbers that we used on this bridge that we constructed,

those we bought, that is, the stringers to the bridges, the bents, whatever timber is in the bents, was on the ground."

After the first opinion was filed in this case in the Circuit Court of Appeals, the appellants asked for a modification of the opinion to include the timberland conveyed to the Hamilton Creek Timber Company of the value of $155,000, and also to have the railroad materials which were on the ground and which were used by Cox for the building of the railroad. The Circuit Court of Appeals handled this matter in the following manner (page 4 of Opinion):

> *"The appellees argue that the decree of this Court should be in effect a dismissal of the bill because there are but few possible classes of property not directly affected by the terms of the contract, namely, commissary supplies, railroad material, ties and such property. They say these things were upon the land of the J. K. Company and paid for out of the* $215,000, *and were put upon the property by Dodge for the purpose of proceeding with the construction of the railroad.*
>
> *"But as the contract did not cover these matters, we hold they are outside of its terms and ought not to be included."*

Undoubtedly this property was given to the trustee on the ground that the title to this property did not vest in the defendants until attached to the soil.

TIES ALLOWED BY CIRCUIT COURT OF APPEALS—4000 TIES, 168,000 feet at $10 per M..... $1680.00

The ties were also directly allowed by the Circuit Court of Appeals.

Babcock testified that there were 4000 ties on the ground figured at 168,000 feet at $10.00 per thousand. There is no dispute as to the number of ties on the ground or their value.

LUMBER $1287.89

This lumber is contained in the Lendholm inventory and in the Lilly inventory. The following is an itemized statement of the lumber upon which Babcock placed a value of $1287.89 and Lendholm placed a value of $1283.56:

1	12x12x30 ft.	1	8x10x24 ft.
2	28 ft.	1	8x10x18 ft.
3	24 ft.	1	6x 8x12 ft.
8	16 ft.	2	6x 8x14 ft.
1	8x10x20 ft.	1	8x 8x10 ft.
1	16 ft.	1	6x 6x32 ft.
3	10x10x22 ft.	2	12x12x30 ft.
10	12x12x16 ft.	1	26 ft.
2	12x12x24 ft.	4	6x 8x24 ft.
6	18 ft.	1	2x10x18 ft.
4	16 ft.	16	6x 6x20 ft.
1	12 ft.	7	6x 6x16 ft.
1	30 ft.	1	6x 6x30 ft.
62	6x 8x 9 ft.	6	6x 6x 6 ft.
1	8x 8x20 ft.	1	3x 6x16 ft.
1	3x 6x24 ft.	24	7x 9x 8 ft.
1	6x 8x18 ft.	2	6x12x24 ft.

7 12x12x30 ft.
5 12x12x16 ft.
7 12x12x20 ft.
4 6x12x20 ft.
3 6x12x16 ft.
1 12x12x16 ft.
1 6x12x14 ft.
10 8x16x14 ft.

4 6x16 32 ft.
4 12x12x16 ft.
2 8x17x30 ft.
2 12x12x12 ft.
17 12x12x10 ft.
1 8x17x30 ft.
6 12x12x16 ft.

350 Pcs. 1x4x16 ft. Ceiling No. 2.
402 Pcs. 1x4x16 ft. Rustic No. 2.
400 Pcs. 1x4x16 ft. Flooring No. 2.
28 1x 6x16 ft. S4S Ch.
26 1x 8x16 ft.S4S Ch.
28 1x 8x16 ft. Rustic.
1 6x 8x14 ft. Common.
4 6x12x 8 ft.
1 6x 8x24 ft.
10 Bal. Lathes.
40 Bal. *A* Shingles.
1 6x12x14 ft.
32 2x12x18 ft. S. S. E. Com.
34 2x 4x16 ft.
1 4x 6x16 ft.
5 6x 8x10 ft. S4S Com.
78 7x 9x 8 ft.
3 6x 8x20 ft.
1 12x12x16 ft.
2 6x 8x20 ft.
1 6x12x40 ft.
2 8x17x30 ft.
12 7x 9x 8 ft.
1 6x16x32 ft.
1 8x17x12 ft.
2 12x12x12 ft.
200 ft. 1x6 Cedar Planking for launch.

4 2½ Rd. 16 ft. long.
8 ⅞x16 ft. Rd.
6 1⅛x16 ft. Rd.
6 1¼x16 ft. Rd.
9 1x3x16 ft.
4 1¼x2¼x16 ft.
4 1½x1½x16 ft.
8 Pcs. 2x 4x16 ft. S. S. E. Common.
54 Pcs. 2x12x18 ft. S. S. E. Common.
1 Pcs. 6x 6x30 ft. Common Rough.
5 Pcs. 12x12x12 ft.
4 Pcs. 6x12x16 ft.
5 Pcs. 12x12x28 ft.
2 Pcs. 12x12x12 ft.
17 Pcs. 12x12x10 ft.
1 1⅞ Octagon, 16 ft.
1 1¼ Octagon, 16 ft.
4 ¾ Octagon, 16 ft.
3 ⅝ Octagon, 16 ft.
3 ⅞ Octagon, 16 ft.
2 1¼x5 in., 16 ft.
3 1¼x4 in., 16 ft.
3 1x3½ in., 16 ft.
1 1x2½ in., 16 ft.
2 1 in. Rd.
2 1⅛ in., 14 ft.
4 2½ in., 16 ft.
3 1 in., 16 ft.
2 1x3½ in., 16 ft.
1 2¼ Rd., 7 ft.
1 1¾ Oct., 7 ft.
1 2½ Rd., 11 ft.
1 1¼x4, 14 ft.

Together with the other items mentioned in the said inventories.

LOGS FROM McRAE LAND.....$820.00

The logs from the McRae land were testified to by Babcock on page 21 et seq. This testimony was corroborated by Cox on his cross-examination, who said that he sold about 137,000 feet of logs for $6.00 per thousand. At least the trustee should be allowed this amount for these, that is, $820.00.

LOGS ON BANK FROM McRAE LAND.....
.....$483.87

These logs, according to Babcock, were bucked and cut off for piling for bridges and sawed to 22 or 34-foot cuts and some as long as 40 feet, and these logs were in one of the sloughs within a set of boomsticks. Babcock testified he scaled these logs up very carefully and their value was $483.87. (See Test., page 21.)

MARSHALL WELLS CO.....$4095.26

All these goods and machinery were shipped to the Hamilton Creek Timber Company and is an approved claim. Invoices of this item are submitted. This bill of goods was not requisitioned and was not paid out of the $215,000, as all these goods were sold after the $215,000 had been exhausted.

Babcock testified that all these materials were taken over on the 12th of May, 1914, and that their reasonable value was the same as their cost value, to-wit, the sum of $4095.26. The exhibit setting forth these items in plaintiff's exhibit 12 and to show the Court the articles that make up this amount, the following is copied from the exhibit:

2 only 4-in. Blk. Cast Ells.
2 only 4-in. Cast Flanges, faced and drilled.
6 only 60 Mars. Axe Stones.
1 only 4x10 Blk. Nipples.
1 piece 4-in. Black Pipe 80½ in. long, 2 threads.
1 length 1½-in. Black Pipe.
2 only 4-in. reg. Thread.
1 only 4-in. Cut.
10 rolls 1 ply Mars. Roofing.
1 doz. 6-in. Dampers.
1 doz. 20-lb. Carpenter's Pencils Zen.
1/6 doz. 100 Dandy Horse Brushes.
¼ doz. ¾-in. Swivel Snaps.
3 only 1⅛x8 ft. Butt Chains.
1/6 doz. No. 114 Pike Poles.
1/6 doz. No. 116 Pike Poles.
100 only ⅝ Rd. Eye Rafting Dogs.
1/12 doz. 10014-in. Rafting Augur.
¾ 550 Horse Brushes.
2 ton Blacksmith Coal.
1 doz. 33W, 13W and W Pitchers.
5/6 gross 52 Montana Tea Spoons.
1 only ½-in. Pipe Tap.
12 only 1-in. Williams Globe Vales.
6 only 1¼-in. Williams Globe Valves.
1 bar 2-in. Rd. Mild Steel.
1 bar 2½-in. Rd. Mild Steel.
1 bar 3-in. Rd. Mild Steel.
1 coil ¾ Std. Manila Rope.
2 only 10x12x16 oz. Tarpartens.
1 only 2134½A 2-in. Will Globe Valve.
6 only 2-in. Blk. Ells.
6 doz. 7-in. Mars. M B Files.
2 doz. 6 Mars. M B Tiles.

½ doz. 1-pt. cans Neatsfoot Oil.
½ doz. 39 W Railroad Lanterns.
½ doz. 39 Railroad Lant. Globes.
1/12 doz. 5S 1½ Stebbins Oil Gates.
1/12 doz. No. 1 Bunghole Borers.
1 piece 3-in. Blk. Pipe, 1ft. 1 in. long.
2 only 3-in. Tread.
1 doz. 35 Viscol Oil.
1 doz. 55 Whale Amber.
30 only 30 Roch. Lamps.
½ doz. 303 No. 3 Roch. Lamp Chimneys.
½ doz. 72 Ray Gaso Mantles.
50 Jts. 6-in. Perf. Stove Pipe.
12 sheets 20x28 Nepigon Tin.
4 pr. 831-A 3½x3½ Jap. Butts.
1/3 doz. 82- Ki Mortise Locks.
1 doz. 7761 Blank Keys.
1/12 doz. 1056-J Foot Bolts.
1/12 doz. 1055-J Chain Bolts.
¼ gross 60 Coat and Hat Hooks.
1/12 doz. 16 Oilers.
325 ft. 8-in. Galv. Corrg. Culvert.
12 lbs. 6-oz. C H Hung Nails.
6 cans 5-lb. Med. Badger Compound.
2 doz. 7-in. Slim Taper Files, Mars.
1/6 doz. 34-in. Ship Adze Handles.
1 only No. 16 600-lb. Hart Platform Scale.
1 box ⅜ Sq. Peerless High Pressure Packing.
1 box ½ Sq. Peerless High Pressure Packing.
1 box ⅝ Sq. Peerless High Pressure Packing.
6 only 9 Yankee Nic. Watches.
1 only Marathon Auto Alarm Clock.
1 doz. No. 2 Mars. Lanterns.
½ doz. 16 Jap. Dust Pans.
6 only ¼ Black Ells.

6 only ¼ Black Tees.
6 only ⅜ Black Ells.
6 only ⅜ Black Tees.
6 ⅜ Black Short Nipples.
6 ¼ Black Short Nipples.
6 ¼x⅛ Black Bushings.
6 ⅜x¼ Black Bushings.
6 ½x⅜ Black Bushings.
6 ⅜x¼ Black Reducers.
6 ½x⅜ Black Reducers.
1 doz. 540 4 lbs. O. H. M. Swamping Axes.
1 doz. 540 4½ lbs. O. H. M. Swamping Axes.
6 only ¼ Black Plugs.
6 only ⅜ Black Plugs.
6 only ¼ Black Couplings.
6 only ⅜ Black Couplings.
3 gals. Lard Oil.
1 can 5-gal. Fish Oil.
6 only 51⅛ Pet Cocks.
6 only 1-lb. cans Dixon Flake Graphite.
2 doz. 36-in. D. B. Ben. Ith Oct. Axe Hdles.
1 drum.
1 SPL. 476-E No. 13 Leading Wire.
1/12 doz. 20 Tin Funnels.
1/12 doz. 25 Tin Funnels.
1/12 doz. 30 Tin Funnels.
1 keg 6 Com. Wire Nails.
1 coil ⅜ Sid. Manila Rope.
24 only ⅞-tooth Chains, stamped "C. B. Co."
2 only 1½-in. Coupling Nuts for No. 8 U. S. Injector.
1 only 7 Timber Dollie.
1 doz. 1303 W. 5 Hickory Bangor Peavies.
½ doz. ZS44½P 4 to 4½ Zenith Ship Adzes.
1 doz. 34-in. Ship Adze Handles.

½ doz. Hickory Rev. Broad Axe Handles.
7/12 doz. 842 1½x28 Blind Butts.
1/12 gross 40 4-in. Gate Hooks and Eyes.
6 only 1¼ 1170B Choker Sockets.
6 only 1170C 1¼ Peters Choker Hooks.
1 box Mars. Genuine Babbitt.
2 doz. 5⅝x12 Ga. Glasses.
1 doz. 8¾x12 Ga. Glasses.
1 only 30 Chesterton Ga. Glass Cutter.
1 only 27 Sight Feed Valve for 1 pt. Det. Lubricator.
1 doz. 8-oz. Uph. Carpet.
1 only 8-15 Fern Cook Stove.
1 only 21-8in. Dble. Wood Tackle Block.
1 only 22 8-in. Triple Wood Block.
1 only 3x4x12 ft. Rough Oak Wagon Pole.
1coil 1-in. Std. Manila Rope.
5 only Drip Pans 19x23x4.
1/12 14-in. French Egg Whips.
1/12 doz. 20 Tin Scoops.
1/12 doz. 30 Tin Scoops.
33 only Swifters.
½ doz. 202 5½/8 Ship Augers.
½ doz. 202 4½/8 Ship Augers.
½ doz. 202 7½/8 Ship Augers.
1 only 7 Timber Dollies.
12 only 1-in. Williams Globe Valves.
6 only 1¼-in. Williams Globe Valves.
3 only No. 30 Lamps.
1 only No. 300 Air-O-Lite Lamp.
1 only 3x6 Blk. Nipples.
1 only ¼x1½ Blk. Nipples.
1 only ¼x2 Blk. Nipples.
1 only ¼x2½ Blk. Nipples.
1 only ¼-in. Close.

3 only 3-in. Cast Ells.
1 only 2½-in. Cast Ells.
2 only 1¼-in. Cast Ells.
1 only ¼ Mall. Ells.
1 only 3x2½x2½ Cast Tee.
1 only 1¼ Blk. Coupling.
1 only ⅜x¼ Blk. Bushings.
1 only 1¼-in. Williams Globe Valve.
1 piece 3-in. Black Pipe, 58½ in.
2 pieces 2½ in. Black Pipe, 12 in.
1 piece 1¼-in. Black Pipe, 43 in.
1 piece 1¼-in. Black Pipe, 10½ in.

T. B. E.

2 only 3-in. Pipe Threads.
4 only 2½-in. Pipe Threads
4 only 1¼-in. Pipe Threads.
5 ft. High Tension Wire.
1 only ⅜ Pipe Tap No. 101.
½ doz. 14-in. Mars. M. B. Files.
½ doz. 16-in. Mars. M. B. Files.
½ doz. 18-in. Mars. M. B. Files.
1 length ¼-in. Black Pipe.
1 length ⅜-in. Black Pipe.
2 doz. 110 6-in. Stove Pipe Elbows.
1/12 doz. No. 1 Tur. Nead Glass Cutters.
5 kegs ½x10 Blk. Boat Spikes.
2 kegs ⅜x9 Blk. Boat Spikes.
1 doz. 3½/8 Hungarian Nails.
1 doz. 4⅛ Hungarian Nails.
1 M. CC. Boot Calks.
2 doz. 58 Tap Soles.
1/24 doz. 50 ⅞ Swivel Snaps.
1 doz. No. 56 1-lb. Whale Amber.
1 doz. ½-pt. Watertight Oil.
1/12 doz. 609 Wash Boilers.

1/12 doz. 31 1 A-1 Oil Cans.
½ doz. No. 2 Marswell Cold Blast Lanterns.
1 ton Blacksmith Coal.
1 bale D Colored Waste.
5 kegs ½x10 Black Boat Spikes.
2 doz. PR. 902 6-in. Strap Hinges.
6 doz. 7-in. Mars. M. B. Files.
2 gross 1x10 F. H. Brt. Screws.
1 keg ⅝ Wrt. Washers.
1 keg ¾ Wrt. Washers.
16 Spls. 3-ply Mars. Roofing.
30 ft. 350 1½ Hard Rubber Suction Hose.
8 only ¾x48 Machine Bolts, 4-in. Threads.
6 only ¾-in. Std. Hor. Check Valves.
24 only 1-in. Blk. Couplings.
24 only 1-in. Blk. Unions.
1/12 doz. 4¾ D. B. Cal. Rev. Axes.
6 only 513 No. O Grease Cups, ¼ Conn.
1 only 8-Day Marathon Alarm Clocks.
1 only 445½ Hartford Scale.
1 only 8-Day Marathon Alarm Clock.
1 only 28-in. Airtight T. D.
3 kegs ⅜x9 Blk. Boat Spikes.
1 keg ⅝ Mall. Washers.
1 keg ¾ Mall. Washers.
2 only 300 Air-O-Lite Lamps.
1 doz. No. 72 Gas Mantles.
1 ton B. S. Coal.
2 doz. Cork Insoles, assorted.
100 ⅜x3 Carriage Bolts.
150 ⅜x2½ Carriage Bolts.
1 only 1001 Raincoat.
48 sheets 10-ft. Galv. Org. Iron.
9 only 645 M-7 Bucking Wedges.
2 only 1301 RR. Undercutters.

1 Drum Water White Kerosene in Drums.
1 only Iron Drum.
1 only 303 2-in. Jenkins 1 B. Blow-Off Valve.
1 ton Blacksmith Coal.
25 only 01-¾ Bed Springs.
25 only 1781 8 A. B. Grade ¾ Mattress Burlap.
12 only 5-lb. cans No. 2 Badger Compound.
25 lbs. Climax Welding Compound.
4 doz. No. 103 12-in. Mars. Hack Saw Blades.
2 yds. 1/8 Rainbow Packing.
50 lbs. 1 Hex. Mfg. Std. Tap Nuts.
75 lbs. 1¼ Hex. Mfg. Std. Tap Nuts.
25 only 1½ Hex. Mfg. Std. Tap Nuts.
1 only 1¼ Williams Horz. Check Valve.
1 only 2 175 lbs. Pop Safety Valve.
1 only 1¼ 36 3 Way Sq. Hd. Valve.
12 only 515 No. 2⅜ Grease Cups.
30 ft. 1¼ 6-ply Steam Hose.
50 lbs. Fire Clay.
6 8lbs Mars. Babbitt.
68 lbs. Auto Friction Babbitt.
1 only part 343 for 3-pt. or 2-qt. Manzel Oil Pump.
1 only part 341 for same.
1 only part 304 for same.
1 only part 329 for same.
1 case 1-lb. Whale Amber.
1 doz. ½ pt. Viscol Oil.
¼ doz. 2-C Lanterns.
1 only 125 Cherry Heater.
1 only 22 Com. Airtight Heater.
1 only No. 35 Sugar Kettle.
20 1¼ Dredge Chain.
26 rolls 3-ply Mars. Roofing.
4010 7 ft. 1 in. Black Pipe.

18 only 12x14 8 Lt.Plain Rail Glazed Windows.
4000 ft. No. 18 Signal Strand.
1 doz. 570 4½ lbs. Falling Axes.
1 doz. 600 4¾ Calif. Rev. Axes.
3 doz. 36-in. Extra Sledge Handles.
6 only 14-in. Stillson Wrenches.
1 only 14-in. 2 Flue Cleaner.
1 set No. 3 Light Horse Shoes.
5 lbs. No. 6 Capewell H. S. Nails.
12 ¼x½ Set Screws.
12 ¼x¾ Set Screws.
12 ¼x1 Set Screws.
12 ½x½ Set Screws.
12 ¼x¾ Set Screws.
12 ½x1 Set Screws.
12 ⅝x¾ Set Screws.
12 ⅝x1 Set Screws.
12 ⅝x1½ Set Screws.
12 ¾x1 Set Screws.
12 ¼x1½ Set Screws.
1 only 10-in. Trime Wrench.
1/12 doz. 10 Westcott Nut Wrenches.
1/12 doz. 12 Westcott Nut Wrenches.
6 only 5-lb. cans No. 2 Badger Compound.
2 only 5-lb. box Boraxette.
2 doz. No. 7 ⅝x12 Gauge Glasses.
1 box ¼ No. 20 Packing.
1 box ⅜ No. 20 Packing.
1 box ½ No. 20 Packing.
1 box ⅝ No. 20 Packing.
½ pt. Muriatic Acid.
1 M. O. Boot Calks.
1 doz. 3-oz. Gimp Tacks.
1/12 doz. No. 75 Tallow Pots.
1 doz. 103 Cannon Pump Oilers.

6 only 10 lbs. 740 D. F. Sledges.
4 only 12 lbs. 750 D. F. Sledges.
2 doz. 40-in. Zenith Oct. D. B. Axe Handles.
2 doz. 35-in. Zenith Oct. D. B. Axe Handles.
1 ton Blacksmith Coal.
5 bars ¼ Rd. Com. Iron.
5 bars 5/14 Com. Iron.
5 bars ⅜ Com. Iron.
5 bars ½ Com. Iron.
5 bars ⅝ Com. Iron.
5 bars ¾ Com. Iron.
5 bars 1 Com. Iron.
3 bars 1½ Rd. Norway Iron.
2 bars 1¼ Rd. Norway Iron.
½ doz. IXL Stove Shovels.
6 cases Union Kerosene, 5-gal. cans.
2 drums Com. Coal Oil.
1 bale D Colored Cotton Waste.

The cost value and the expert opinion of value is the very best evidence that can be produced. This property was not paid for out of the $215,000.

POWDER $937.54

This powder was sold by the DuPont de Nemours Co. Their total claim against the estate is $2790.77. $588.95 was bought after the $215,000 had been exhausted.

Babcock and Lendholm testified as to the powder and its value and the aomunt of powder taken over on May 12, 1914, to-wit, the sum of $937.54. That this powder was not paid for is evidenced by the approved claim of DuPont, etc., Exhibit 13.

COMMISSARY $2565.93

This commissary stock is represented by the following claims approved against the Hamilton Creek Timber Company.

Wadhams & Co	$4846.29
Chris Solum Shoe Co	891.87
Portland Flouring Mills	88.29
Dogherty Shoe Co	201.55
Theo. Bergman Shoe Co	229.05
Neustadter	1083.69
Everding & Farrell	301.31

The inventory of this stock and the values placed thereupon by Babcock are set forth as follows: (Page 270 Record.)

6 cans K. C. Baking Powder, 18¾c ea	$ 1.13
1 carton Yours Truly Macaroni, 25 lbs	1.38
15 Diamond W Macaroni, 1s, 90c doz	1.12
16 Diamond W Noodles, 1s, 90c doz	1.20
8 cans Wadco Oysters, $2.20 doz	1.37
23 cans Bayocean Salmon, $1.25 doz	2.40
7 cans June Peas, $1.05 doz	.61
37 cans Pheasant Brand String Beans, 95c doz.	2.93
6 pkgs. Diamond W Head Rice, 1s, $1.00 doz.	.50
27 pkgs. Diamond W Soda, 1s, 4½c each	1.22
6 bottles Catsup, 10½c each	.63
6 pkgs. Diamond W Tea, 1c, 37½c each	2.25
6 pkgs. Diamond W. Tea, ½s, 19c each	1.14
4 pkgs. Diamond W Salt, 82½c doz	.25
46 pkgs. Riverside Starch (gloss), 6¼c each	2.87
15 pkgs. Quaker Rolled Oats, 10c each	1.50

12 pkgs. Diamond W Pancake Flour, $1.25 doz.	1.25
9 2-oz. Diamond W Pepper, 75c doz.	.56
22 2-oz. Diamond W Mustard, 75c doz.	1.37
10 2-oz. Diamond W Allspice, 80c doz.	.67
10 2-oz. Diamond W Cloves, 85c doz.	.71
9 2-oz. Diamond W Ginger, 80c doz.	.60
10 2-oz. Diamond W Cayenne, $1.00 doz.	.83
18 2-oz. Diamond W Cinnamon, $1.35 doz	2.02
17 2-oz. Diamond W Nutmeg, $1.35 doz.	1.91
15 cans Corn, 90c doz.	1.13
6 cans Pineapple, $1.30 doz.	.65
3 cans Pheasant Brand Peaches, $1.60 doz.	.40
27 cans Wadco Tomatoes, $1.02½ doz.	2.31
5 bottles 2-oz. Diamond W Vanilla Extract, $3.00 doz.	1.25
9 bottles 2-oz. Diamond W Lemon Extract, $2.00 doz.	1.50
8 pkgs. Yeast Foam, 40c doz.	.27
2 pkgs. Magic, 40c doz.	.07
6 ½-lb. Diamond W. Cinnamon, 36 1/3c each	2.18
2 ½-lb. Diamond W Mustard, 18c each.	.36
17 cans Beechnut Pork and Beans, $1.00 doz.	1.42
24 cans Yeloban Milk, 92c doz.	1.84
1 bucket Columbia Syrup	.23
1 bucket 5-lbs. Columbia Lard, $8.77 doz.	.73
1 sack Diamond W Hominy	.28
22 short pts. Knight's Mixed Pickles, $1.20 doz.	2.20
22 pts. Mixed Picnic, $2.25 doz.	4.15
10 qts. Mixed Picnic, $3.25 doz.	2.71

8 qts. Sour Picnic, $3.25 doz	2.17
31 boxes Toothpicks, 37c doz	.95
4 11/12 doz. Gelatine, 83½c doz	4.10
21 cans Wadco Pumpkin, $1.25 doz	2.19
19 cans Pheasant Brand Apricots, $1.65 doz.	2.65
10 lbs. Navy Beans, 5c lb	.50
20 lbs. Sugar, 5c lb	1.00
10 lbs. Lima Beans, 5c lb	.50
2 5/12 doz. bottles Wadco Vinegar, qts., $1.25 doz	3.02
1 1/3 doz. bottles Diamond W Bluing, 75c doz.	1.00
3½ doz. cans Dutch Cleanser (4 doz. case), $3.45 case	3.02
2 1/3 doz. cakes Bon Ami, 84c doz	1.96
10 pkgs. Citrus Washing Powder,18 1/3c each	1.83
2½ doz. Glycerine Soap, $9.00 gross	1.88
3 1/3 doz. bars Sapolio, 80c doz	2.67
20 bars Jergins' Pumice Soap, 6½c each	1.30
46 small bars Tar Soap, 3¾c each	1.72
75 cakes Ivory Soap, 7c each	5.25
4 cakes Elk Savon Soap, 2c each	.08
1 doz. No. 2 Lamp Burners, 85c doz	.85
2 cases Black Diamond Matches, $3.40 case	6.80
58 boxes Black Diamond Matches (100 in case), $3.40 case	1.97
2 Washboards, $4.25 doz	.71
7 Brooms, $4.25 doz	2.49
5 1/3 doz. No. 2 Lamp Chimneys, 80c doz.	4.27
2 only No. 1 Lamp Chimneys, 55c doz	.09
2 No. 2 Rochester Chimneys, $1.00 doz	.17

16 No. 1 R. R. Lantern Globes, $1.00 doz.	.50
12 No. 2 R. R. Lantern Globes, 95c doz.	.95
19 Cob Pipes, 30c doz	.47
Lot 3672—5 Pipes, $4.00 doz	2.67
Lot 1120½—5 Pipes, $4.00 doz	1.66
2 Wellington Pipes, $4.00 doz	.67
24 Pipes, $2.00 doz	4.00
286 White Cigarette Papers, $1.85 per 100	5.20
8 boxes Mexican Cigarette Papers, $1.00 box	8.00
48 pkgs. Mexican Cigarette Papers, 2c ea.	.96
75 lbs. Potatoes, $1.00 per 100 lbs	.75
12 1/3 doz. Edgeworth, 96c doz	11.84
14¾ doz. Gold Shore, 97c doz	14.30
2¼ doz. Five Brothers, 88c doz	1.98
8¾ doz. Dixie Queen, 96c doz	8.40
6 1/6 doz. Pedro, $1.00 doz	6.17
9 1/3 doz. Peerless, 47½c doz	4.43
29 11/12 doz. Bull Durham, 44½c doz	13.31
16¼ doz. Tuxedo, 96c doz	15.60
19¼ doz. Prince Albert, 96c doz	18.48
8 11/12 doz. Union Leader, 97c doz	8.65
12 doz. Velvet, 96c doz	11.52
4 lbs. Westover, 53c lb	2.12
5 lbs. Horseshoe, 43c lb	2.15
12½ lbs. Star, 45c lb	5.67
78 boxes Snuff, 4c each	3.12
450 Beechwood Cigars, $35.00 M	15.75
210 Porto Wana Cigars, $32.08 M	6.74
10 Cortez Cigars, $62.50 M	3.13
14 pr. North Coast Loggers, $3.60 pr	49.00
12 pr. Chris Solum, $3.21 pr	38.52
4 pr Goodyear, $3.00 pr	12.00
5 pr. Dougherty Red Logger, $6.00 pr	30.00
5 pr. Bergmann Calked, $7.00 pr	35.00

Lot 405—8 pr. Chris Solum, $6.50 pr..... 52.00
Lot 420—24 pr. Chris Solum Sp. H. Calked, $5.00 pr.....120.00
Lot 419—22 pr. Chris Solum Sp. H. Calked, $5.10 pr.....112.20
Lot 427—2 pr. Chris Solum Heeled, Calked, $5.25 pr.....115.50
Lot 419—7 pr. Chris Solum Heeled, Calked, $5.15 pr..... 36.05
Lot 427—1 pr. Chris Solum Heeled..... 4.75
Lot 418—7 pr. Chris Solum Heeled, $4.60 pr. 32.20
7 pr. low, black (Sweney), $2.25 pr..... 15.75
1 pr. low, tan (Sweney)..... 2.50
Lot 2611—11/12 doz. Undershirts, wool, $12.00 doz..... 11.00
Lot 2611—10/12 doz. Underdrawers, wool, $12.00 doz..... 10.00
7/8—11/6 doz. Undershirts, wool, $12 doz... 14.00
2601—5/12 doz. Underdrawers, wool, $9 doz. 3.75
2601—6/12 doz. Undershirts, wool, $9 doz. 4.50
2545—1½ doz. Undershirts, wool, $22 doz. 33.00
2545—1½ doz. Underdrawers, wool, $22 doz. 33.00
W-5—9/12 doz. Undershirts,wool, $11 doz. 8.25
2543—1 5/12 doz. Underdrawers, wool, (14/12), $9.00 doz..... 12.75
Odd Wool—2 8/12 doz. Undershirts, wool, $12.00 doz..... 32.00
11—1 1/12 doz. Undershirts, cotton, $7 doz. 7.58
8—10 4/12 doz. Underdrawers, cotton, $6.00 doz..... 2.00

8—10 1 3/12 doz. Undershirts, cotton, $6.00 doz. 7.50
4/12 doz. Undershirts, cotton ribbed, $4.50 doz. 1.50
Lot 1170—1 2/12 doz. Flannel Shirts, blue, $27.00 doz. 31.50
Lot 850 SB—1 doz. Flannel Shirts, blue, $23.00 doz. 23.00
Odd—1/12 doz. Flannel Shirts, blue, $16.50 doz. 1.37
550—1¼ doz. Flannel Shirts, blue, $15.00 doz. 18.75
429—1 5/12 doz. Flannel Overshirts, blue, $42.00 doz. 59.50
462—4/12 doz. Flannel Overshirts, gray, $42.00 doz.— 14.00
418—1/12 doz. Flannel Overshirts, blue, $31.50 doz. 2.65
5/12 doz. Flannel Shirts, mixed, $12.00 doz. 5.00
6/12 doz. Flannel Shirts, mixed (one bad) 15.00
2 2/12 doz. Cotton Overshirts, $4.50 doz. 9.75
18 pr. Cotton Shoe Laces, 5c doz. ..... .08
26 2/3 doz. Blue Handkerchiefs, 67½c doz. 18.00
1/12 doz. Bib Overalls, $10.75 doz. ..... .90
3 7/12 doz. Plain Overalls, $9.25 doz. .. 33.15
2 8/12 doz. Jumpers, $8.25 doz. 22.00
3 pr. Corduroy Pants, $1.75 each 5.25
2 pr. Cotton Pants, $9.00 doz. 1.50
1 pr. Bib Overalls (Sweney) ..... .75
1 pr. Slicker Pants, $8.80 doz. ..... .73
1 1/3 doz. Slicker Coats, $9.25 doz. 12.33
15¾ length Aquapelle Coats, $3.50 each 54.00

11½ doz. Plush Caps, $12.00 doz	11.00
2/12 doz. Leather Caps, $12.00 doz	2.00
10 pr. Arm Bands (retail 25c), $2.00 doz.	1.66
11 pr. Arm Bands (retail 15c), $1.50 doz.	1.38
40 pr. Arm Bands (retail 10c), 75c doz	4.00
2 pr. Wool Gloves, $4.50 doz	.75
4 pr. Gauntlet Gloves, $13.50 doz	4.50
10 pr. Leather Mittens, $9.00 doz	7.50
10 pr. Canvas Gloves, 85c doz	.71
Lot 951—1 1/12 doz. Gray Cashmere Sox, $2.17 doz	2.54
2 doz. pr. Cotton Sox, 75c doz	1.50
10 pr. Crown Suspenders, $4.37 doz	3.65
Job Rubber Boots	22.00
1 only pr. Paris Garters, $1.90 doz	.16
6 5/12 doz. Slicker Hats, $2.20 doz	14.11
12 pr. Wool Blankets, $1.65 each	19.80
4 pr. Washington Blankets, $1.55 each	6.20
23 pr. Cotton Blankets, $1.30 each	29.90
Apples, canned, 8s, 4 cases @ $2.75	11.00
Apples, dried, 50s, 2 boxes @ $4.00	8.00
Bacon, 5 sides, average $3.03 each	15.15
Barley, Pearl, 2 sacks @ $1.38	2.75
Beans, Pink, 1½ sacks @ $3.30	4.95
Beans, Pheasant Brand, String, 1 11/12 cases @ $3.50	6.71
Beans, Navy, 1 sack and 105 lbs. @ $3.85 cwt.	11.15
Blackberries, 1/3 case @ $3.75	1.25
Brooms, Heavy Mill, 1/3 doz. @ $6.00	2.00
Brush, Scrub	1.34
Brush, Sink	.12
Butter, Cedar Brook	37.80
Catsup, canned, 2 cases @ $6.00	12.00
Catsup, jackets, 4@ $2.40	9.60

Cocoanut, 3 buckets @ $3.70	11.10
Codfish, ½ box, 20 lbs., @ 9½c lb	1.90
Coloring Egg Yellow, 1 qt	.85
Compound, Lard, 2 cans 50s @ $5.01	10.01
Crackers, 1 case 20 lbs	1.44
Culvert, 325 ft. 8 in. gal. Culvert	158.44
Currants, 1 box 25 lbs	2.75
Gold Dust	.18
Extract, Lemon (contract)	22.50
Extract, Vanilla, 7 qts. @ $1.55 and contract $38.75	49.60
Flour, 49s, 51 sacks	57.37
Flour, Graham, 5 sacks @ $1.15	5.75
Flour, Rye, 3 sacks @ $1.12	3.36
Ham, 3@ $2.32	6.96
Kraut, Sour, 2 kegs @ $5.12, 1 keg @ $4.75	14.99
Lime, Chloride of, 42 cans @ 17c	2.94
Macaroni, 2 boxes, 25c, 50 lbs. @ 5½c	2.75
Meal, Corn, 1 sack	1.30
Mince Meat, 2 kegs @ $13.12	26.24
Milk, 26¼ cases @ $3.67½ (Yeloban)	96.46
Molasses, 2 jackets @ $1.65	3.30
Noodles, 1 @ $1.80, 2½ @ $2.75	8.67
Oil, Salad, 6 cans @ 47½c each	2.84
Peaches, Dried, 2 boxes 50s @ $3.63	7.25
Peas, Canned, 8s, 5/12 case @ $5.25	2.19
Petre, Salt	.80
Powder, Baking, 5 cans Diamond W @ 75c	3.75
Prunes, Dried, 2 cases @ $4.25	8.50
Pumpkin, 1 case	2.65
Raisins, 1 case @ $3.00, 1 case @ $3.75	6.75
Rhubarb, 2 cases @ $2.75	5.50
Rice, 1½ sacks @ $4.75	7.15
Salt, 4 4/5 sacks @ 55c	2.64

Soap, Laundry	16.45
Soda, Diamond W, 14 @ 4½c	.63
Spaghetti, 1 case	2.75
Spices, Allspice	1.44
Spices, Cayenne	1.60
Spices, Cinnamon	2.94
Spices, Cloves	2.52
Spices, Ginger	.15
Spices, Mace	.60
Spices, Mustard	4.79
Spices, Nutmeg	1.32
Spices, Paprika, 3 lbs. @ 60c	1.80
Spices, Pepper	7.20
Spices, Chili Powder	2.00
Spices, Curry Powder	1.28
Spices, Sage	.15
Spinach, ½ case	2.20
Squash, canned, 1 case	2.25
Starch, Corn, 6 pkgs. 1s @ 5¼c	.31
Sugar, Granulated, 6 sacks	27.60
Sugar, Powdered, 1 case 21 lbs., 1 case 18 lbs. @ $5.45 cwt	2.12
Syrup, 1 jacket S. D	1.90
Tapioca, 3 sacks @ $1.38	4.12
Tomatoes, 3 1/6 half-cases @ $1.50	4.75
Vegetables, 47 sacks @ $1.32 3/5	62.32
Vinegar, 3 kegs	9.00
Yeast, 2/3 box @ $1.20	.80

All this property was in the store building that was at Hamilton Creek, and Babcock made a careful inventory of it on or about the 12th of May, 1914 (page 24). Being in the store building it was all new stuff.

FAIRBANKS MORSE CO..... $154.75

This item consists of the following articles:

1 set Eclipse Tank Fixtures.....$60.60
1 Push Car 37.75
1 4½x3x4 Steam Pump..... 56.50

These things were taken over, on the 12th of May, 1914, by Jones and Kribs. These did not depreciate in value because they were all new goods.

LOGGERS' OIL EQUIPMENT CO.....$450.00

Oil burner equipment complete, stored in commissary house. Purchased from Loggers' Equipment Company. Not paid for out of the $215,000. This claim is included in the approved claim of the Loggers' Oil Equipment Company for $1500.00.

This was an oil burner for donkey engine stored in commissary. It was new and was worth its full value of $450.00. (Babcock's Test., page 24.)

RASMUSSEN & CO..... $25.57
51 gal. Oil.

This oil was for steam cylinder that was on the ground at the time it was taken over. It was worth what it was invoiced for. (Babcock's Test., page 25.)

STANDARD OIL CO.....$179.77

This was fuel oil on the ground at the time and the amount stated is its reasonable value.

HORSE $75.00

Babcock testified the horse was taken over and that it was worth $75.00 (page 25).

BRIDGE IRON MISCELLANEOUS MATERIALS $464.13

This item consists of bolts, separators and washers for completing the bridges on the railroad line. They were all in the kegs in which they were shipped and were new, and were worth full value and were valud at $464.13 (page 25).

BUNKHOUSES $1200.00

This item consists of 12 bunkhouses, 12x26, which were built on skids so as to load on cars.

Babcock testified regarding these bunkhouses (page 138 of the testimony submitted at the former hearing). He said: "I think that (item) consists of 12 bunkhouses 12x26 feet, all built on skids so as to load on cars."

Lilly's (Jones' agent) inventory made for Jones and Kribs had these bunkhouses listed as "12 movable bunkhouses." They were also listed by Lendholm in his inventory as 12 standard bunkhouses.

These bunkhouses being movable, are personal property and could be carried from one part of the work to another. Not being affixed to the real estate, they were chattels and not having been paid for by Jones and Kribs, they belonged to the bankrupts.

FLAT CAR $985.00

This is admitted to have been taken over in the Lilly inventory made for Jones and Kribs. It was also enumerated in the inventory made by Lendholm and its reasonable value is testified to by Babcock as $985.00.

BALLAST CAR	$487.15
TRACKLAYING CAR	$133.59
OFFICE FIXTURES	$300.00

These items are included in the Lilly inventory and their value is fixed both by Lendholm and Babcock to be the same as that set forth in the inventory.

In connection with the foregoing it is to be noted that the defendants have offered no evidence against the value of any of the property taken over.

As this accounting stands there is no evidence whatsoever to contradict the evidence of the plaintiff either as to the property being taken over or the value of the property taken over. The only defense put up is that the Circuit Court of Appeals was wrong in holding that this property was not included in the forfeiture clause. The mere statement of this proposition shows than it can be no defense, for the decision of the Circuit Court of Appeals is the law of this case.

We attempted in this case to have a master appointed to check over all the accounts and furnish a report to the Court in order to save the Court from making the examination, but the defendants insisted that no master be chosen. After having succeeded in preventing a master from being appointed, the defendants claim that the evidence is not satisfactory or sufficient to establish the issues in this case. But we want to point out to the Court that we furnished the bills and invoices and showed the value of the property by expert testimony. In addition to this the books of the bankrupts are before the Court, and

if it is desired to go into the books to further ascertain the value of the property, the opportunity for that was apparent, although we believe that the evidence of the experts and the evidence of the values, as furnished by the cost values, is abundantly sufficient.

Judge Corliss said in his argument:

> *"It is perfectly impossible for this Court to pick out any piece of personal property and say with respect to it under the evidence in this case that this property was taken by the J. K. Lumber Company and was not paid for out of the* $215,000.

Our answer is that it is perfectly clear that this entire statement quoted above is erroneous. We have shown by evidence beyond dispute that none of the $215,000 was applied to any of the property claimed in this accounting. In the case of the Willamette Yarder and the trucks for which Dodge received the money, it has already been pointed out that he failed to pay this money on these items, and his misdirection of these funds is a thing that the creditors are in no way connected with, and particularly since Dodge was the agent of the defendants in the disbursement of this fund.

We have already pointed out that the evidence in this case went to the value of all the property taken over minutely. Each article was segregated and the value of the article at the time it was taken over was given in evidence. We showed the cost value and

the expert value. We are familiar with the rule that in cases of this kind, where the conversion occurred over six years ago, that we might give an expert opinion of the lump value of all the articles taken over. We have cited authorities that this could be done and would be sufficient in many cases, especially where the property had been lost or destroyed. In this case the property has been used for several years by these defendants and has been either lost, destroyed or disposed of, so that to require us to go further would be to require us to perform the impossible. As a practical matter, devoid of all technicality, the Court can see that we have produced evidence of the actual value of the property. The very best evidence of the value of any property is the cost value, coupled with expert opinion as to each and every item at the time of the conversion. If the property was taken over yesterday it would be difficult for us to either conceive of, or obtain any better evidence than that furnished at the trial. Each of the different items is enumerated, segregated and classified. Further than that the evidence before the Court is conclusive that none of the $215,000 was used to purchase or obtain any of the property claimed by the plaintiff to be included in the accounting.

In Chicago v. Ohio City Lumber Co., 214 Fed. 751, at page 754, the Circuit Court of Appeals for the Sixth Circuit said:

> *"Where more accurate evidence is not available or obtainable, any person, whether owner,*

active manager or employe, who is familiar with the property and goods connected with and used in a business, although not an expert, may testify as to the value if such property when destroyed by fire, and his estimates of value may be given in single or gross amounts. Union Pacific R. Co. v. Lucas, 136 *Fed.* 374, 377, 69 *C. C. A.* 218; *Walker v. Collins,* 50 *Fed.* 737, 740, 1 *C. C.* 642; *Jensen v. Palatine Ins. Co.,* 81 *Neb.* 523, 116 *N. W.* 286; *Thomason v. Capital Ins. Co.,* 92 *Iowa* 72, 61 *N. W.* 843; *Bolte & Jansen v. Equitable Fire Ins. Ass'n,* 23 *S. D.* 240, 121 *N. W.* 773; *Farley v. Springs Garden Ins. Co.,* 148 *Wis.* 622, 134 *N. W.* 1054, 10561; 17 *Cyc.* 113, 115"

The defendants claim that the equities are in their favor, but by any process of reasoning the only property that the defendants could take was the property included in the $215,000 because that was the only property that the bankrupt corporations were obliged to acquire under the contract. Both Jones and Kribs testified that when they converted the property they did not make any investigation to ascertain whether or not the property converted was included in the $215,000 or not. They simply went on the ground and took everything and it did not matter to them whose property it was. The equities of Jones and Kribs are entirely imaginary as against the creditors and amounts to mere buncombe. The creditors who sold the personal property to Dodge, who was the agent of Jones and Kribs, from an equitable point

of view, certainly stand in a better position than these defendants, who roped Dodge into their bonding scheme in order to enrich themselves.

With respect to the burden of proof we have sustained our burden of proof and proved beyond any question that none of the $215,000 ever purchased one particle of the property we are suing for. As a matter of fact, there is no evidence to the contrary in this record. Defendants say the logging trucks were of course a part of the railroad equipment, but what of it? Are we to go to the Circuit Court of Appeals; wait several years, and then be confronted by Judge Corliss' statement that this case is not now to be tried by the rule laid down by the Circuit Court of Appeals. The Circuit Court of Appeals did not give to the defendants any logging equipment, or any railroad equipment or any other equipment. The only thing that the Circuit Court of Appeals gave to the defendants was any property purchased out of the $215,000. This constant ignoring of the express decision of the Circuit Court of Appeals should not bespeak any particular favor in behalf of the defendants. The property included in the forfeiture clause is limited to the property purchased with the $215,000 because the Circuit Court of Appeals has held that that was the only property included in the contract.

Obviously, if there was any doubt as to the property taken over by the defendants, they would have introduced some evidence to show that it was not taken over, and if there was any contest as to the

value of the property taken over, the defendants would have produced some evidence contradicting the values set on the property by the plaintiff; so that the accounting comes before the Honorable Judge of the Circuit Court of Appeals in this case on the evidence produced by the plaintiff as to the property and the values and with no evidence produced by the defendants whatsoever on this issue.

Witnesses are presumed to speak the truth and the plaintiff's witnesses testifying as to the conversion of the property and its value were in no way discredited, and the testimony of the plaintiff's witnesses as to the conversion and the values is in no way improbable. From these circumstances it would seem that the testimony comes within the rule that such evidence legally establishes the fact.

In Newton v. Pope, 1 Cow. (N. Y.) 109, the Court said:

> *"Where the witness is unimpeached, the facts sworn to by him uncontradicted, either directly or indirectly by other witnesses, and there is no intrinsic improbability in the relation given by him, neither a court nor a jury can in the exercise of a sound direction disregard his testimony." Enc. of Ev., Vol.* 14, *page* 22.

The burden of proof was on the plaintiff in this case to show the property converted and its nature and the amount and value thereof. The plea that any part of this property was paid for out of the

$215,000 would amount to a plea by way of confession and avoidance, and the burden upon that issue would be upon the defendants. (See Smith v. Hill, 232 Mass. 188; 2 Am. Law Rep. 1667.) But we have voluntarily in this case assumed both burdens. We not only proved the property taken over and its value, but we also negatively proved that none of this property was paid for out of the $215,000 and all our testimony in this regard stands uncontradicted.

All the defendants could take in any event under the forfeiture clause was the property included in the contract and purchased with the $215,000. They had no rights in any other personal property on the ground, and we therefore respectfully submit to the Honorable Federal Court that we are entitled to the value of all the personal property converted on the 12th of May, 1914, which was not included in the contract and which was not paid for out of the $215,000.

Respectfully submitted,

THOMAS MANNIX,
GUY L. WALLACE,
Attorneys for Plaintiff.

Portland, Ore., October 6, 1921.

3783

In the Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

PARKER STENNICK, Trustee in Bankruptcy for the Hamilton Creek Timber Company, a Corporation, and the Rainier Lumber & Shingle Company, a Corporation,

Plaintiff-Appellant,

vs.

WILLARD N. JONES, FRED A. KRIBS and the J. K. Lumber Company, a Corporation,

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APPELLEES' BRIEF.

Appeal from the Decree of the District Court of the United States for the District of Oregon on Accounting.

GUY C. H. CORLISS,
Attorney for Appellees.

PIONEER PRINTING & STAT'Y CO., PORTLAND

In the Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

PARKER STENNICK, Trustee in Bankruptcy for the Hamilton Creek Timber Company, a Corporation, and the Rainier Lumber & Shingle Company, a Corporation,

Plaintiff-Appellant,

vs.

WILLARD N. JONES, FRED A. KRIBS and the J. K. Lumber Company, a Corporation,

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APPELLEES' BRIEF.

Appeal from the Decree of the District Court of the United States for the District of Oregon on Accounting.

Appellees object to a retrial of the merits of this case by this court on this appeal, in view of the nature of the record before the court. As this court well knows, this case has a history. Upon the former appeal it was sent back to the District Court for an accounting. Upon this accounting some additional evidence was taken before his Honor, Judge Bean. Judge Bean ruled that all of the other evidence which had been previously taken in the case was before him for consideration on

the accounting, and that the whole case was as much before him as though he had himself, on his own motion, opened up the case for an accounting after final decree had been entered. The evidence taken upon the original hearing in the District Court consisted of two classes:

One class comprised oral testimony given by witnesses in court and certain exhibits offered in evidence. The other class, and by far the largest portion of the evidence, consisted of portions of the testimony taken on the trial between the same parties in a suit in the Circuit Court of Multnomah County, Oregon, which portions of such evidence were stipulated into the case on the trial of this case before Judge Bean. This evidence was stipulated into the record out of five large volumes of evidence containing over 3000 pages.

When this case came to this court the first time a statement was properly settled under Equity Rule 75, embodying the substance of the evidence, so far as it appeared to be pertinent to the questions which had been litigated in the court below.

The decision of this court on the first appeal has raised questions necessitating a settlement of a statement under Equity Rule 75 on this appeal to the end that appellees may protect themselves in this court. Portions of the evidence stipulated into the record from the evidence taken in the State Court have become vital on this appeal because they shed light upon the credibility of the witnesses who

testified on the accounting, and because such evidence on the accounting is unintelligible without the aid of the additional evidence so stipulated into the case. If there ever was a case when a litigant was entitled to the protection of Equity Rule 75, it is the case at bar. Moreover, Judge Bean and Judge Bean alone has, under this rule, the absolute right to determine in the settlement of the statement what evidence is necessary to be embodied in such statement. He has the right to have the case heard in this court upon an orderly and full statement settled by him in the usual way and not upon a garbled record.

Counsel for appellants has no excuse for failure to settle a statement in the usual way. On the 14th of April, 1921, I addressed to him a letter in answer to his request to proceed independently of the rule, and in this letter I definitely notified him what my attitude was in the following language:

> "Moreover, I think that the condensed statement gave the Circuit Court of Appeals a wrong impression about the case, and that upon a full statement of the whole record the decree would have been affirmed absolutely. I shall contend in this case that upon the whole record Jones and Kribs are not liable for two reasons:
>
> "First, that there is no liability on them personally, even assuming that the J. K. Lumber Company was liable for something; and second, that upon the whole record you have

failed to maintain the burden of proof showing any sum for which there is any accountability. Of course, Jones and Kribs cannot appeal, as they have been successful, and they therefore have the right upon your appeal to contest their liability upon every ground. I shall therefore insist that this time the complete record be prepared in accordance with Equity Rule 75.

"From the express language of this rule, the duty of condensing and stating the evidence rests primarily upon you. Unless the proposed statement is in substance complete, I shall of course insist under the provisions of this rule that it be made complete before it is approved by Judge Bean. This is a matter that the Circuit Court of Appeals has no jurisdiction over. They may allow you to dispense with a printed abstract, but they have no control over the settlement of the record in the District Court. It would be very unfair to the respondents to dispense with the printing of the record, for in that event I would have nothing to guide me in preparing my brief, as the original record would be in San Francisco."

Despite this notice, no proposed statement has ever been filed; and indeed not a single step has been taken by counsel to comply with any of the requirements of Equity Rule 75. In fact, I have only the information given me by the clerk of the court below to shed any light on the question how this case came to be certified to this court without

Equity Rule 75 being complied with. He informed me that some order had been made by his Honor Judge Gilbert, but I have never seen a copy of the order; it has never been served upon me, and I never had any notice of the application for the making of such order. In this connection I respectfully contend that no judge has any authority to settle any statement except the judge who tried the case, and that no judge or court has any power to dispense with the requirements of Equity Rule 75. This rule has all the force of a statute. The only court having any jurisdiction to dispense with its requirements is the United States Supreme Court, the court which prescribed this rule under authority of an act of Congress.

In 15 Corpus Juris 913 the doctrine is thus stated:

> "When the rules of a court are prescribed by a higher court under a statute, the court for which such rules are prescribed has no authority to modify or suspend the same."

To same effect are:

Poultney vs. LaFayette, 12 Pet. 472.
Gaines vs. Relf, 15 Pet. 16.
Rio Grande & Co. vs. Gildersleeve, 174 U. S. 603-608-609.
15 Corpus Juris, 904.
U. S. vs. Motion Picture Patents Co., 230 Fed. 541.
Rodgers vs. United States, 152 Fed. 426.

The case of U. S. vs. Motion Picture Patents Co., 230 Fed. 541, was decided under Rule 75. In this case the court said:

> "The appellant and this court can be relieved of the obligation of Rule 75 only by the Supreme Court."

In Rio Grande & Co. vs. Gildersleeve, 174 U. S. 608, the court said:

> "But the rule once made without any such qualification must be applied to all cases which come within it, until it is repealed by the authority which made it."

Having no printed record or copy of statement to refer to, all I can submit on the question whether plaintiff is entitled to recover anything, even of the J. K. Lumber Company is the following brief I submitted in the District Court:

"Before discussing the case let us first of all determine the state of the record.

1. A large amount of the testimony and some exhibits were stipulated into the record, being the testimony taken in the State Court in the former action brought by plaintiff against defendants. This consists of five books, which will be delivered to the court with this brief.

2. The evidence taken in this case upon the original trial and before it was taken to the Circuit Court of Appeals.

3. The additional evidence taken on the accounting ordered by the Circuit Court of Appeals.

Throughout this brief we will refer to Dodge and his corporations as "Dodge."

The opinion entirely excludes from the accounting four classes of property: (1) The railroad. (2) The railroad equipment. (3) The logging equipment. (4) All personal property bought with with $215,000.00.

The sole item for which the J. K. Lumber Company is accountable is the personal property taken by the J. K. Lumber Company and not bought with the $215,000.00.

The burden of proof is, both under the law and under the opinion of the Circuit Court of Appeals, upon the plaintiff to establish by legal evidence that the J. K. Lumber Company took some property not bought with the $215,000.00; and in addition the plaintiff must show its value at the time it was taken. Even this, however, would not entitle plaintiff to recover, because it is significant that the Circuit Court of Appeals did not decree that judgment for the value of such property should be rendered by this court, **but only that such decree should be rendered upon the accounting as should be just and equitable.**

The following large items are excluded from this accounting for the reasons hereinafter specified:

1. The Shea locomotive. This had been bought on a conditional sale and only a small payment made on it; and when the J. K. Lumber Company took possession they found this Shea locomotive in the possession of the vendor and the company was unable to exercise any control over this engine and did not exercise any such control by virtue of the forfeiture clause, but entirely by making a new arrangement with the vendor that held the title.

2. The logging trucks were of course a part of the railroad equipment. They were an indispensable instrumentality in transporting the logs from the railroad to the river.

3. The boomsticks were also a part of the logging equipment, according to the undisputed evidence in the case. (Tr. Ev. this case, Oct. 18, 1920, page 55-101.)

Moreover, the evidence indicates that the boomsticks were a part of the Yale logging equipment and this equipment was paid for out of the $215,000.00. (Tr. Ev. this case, Oct. 18, 1920, pages 39-40-101.)

The Bagley scraper: The evidence of Mr. Cox is positive that there was no such scraper on the property. This is worth tons of the testimony of a witness like Babcock. (Tr. Ev. this court, 116.)

The steam drag saw, which is called a steam pond saw by the plaintiff, was in the same shape as the Shea engine. It had not been paid for and was shipped back. (Tr. Ev. this court, 115.)

The jacks were undoubtedly a part of the logging railroad equipment. (Tr. Ev. this court, 116-117.) There is no other position in the category in which the jacks can be put. They were there for use in connection with the logging operations and were a very important factor in the repair of the engine.

The oil tank car was of course a part of the railroad equipment.

The donkey engines were of course a part of the logging equipment; and this is true of the wire cable. In fact, it is impossible to conceive what any of this property was up there for except as a railroad or railroad equipment or logging equipment, unless of course we except the tools and commissary supplies.

In this connection we call the court's attention to the plaintiff's complaint as found at pages 8 to 10 of transcript of record on appeal to the Circuit Court of Appeals. In Paragraph V the plaintiff has listed all of the property that he has ever made any claim for, and this includes tools, commissary stock and messhouse equipment. Then in the next paragraph plaintiff alleges that the railroad was built upon the land of the J. K. Lumber Company under the contract in question, and then the allegation continues as follows:

> "And the other structures and improvements set forth in the preceding paragraph were also built in good faith upon the said

defendants' lands and in accordance with the said contract marked Exhibit 'A.' "

This property was up there for the sole purpose of enabling Lodge to carry out his stumpage contract and was being used as a mere adjunct to the construction of the railroad, which at the time he took possession had not yet been finished. I have always felt that this court was right in saying that it was within the spirit of the forfeiture clause, no matter whether it was bought with the $215,000.00 or not. But the Circuit Court of Appeals has held that if the plaintiff can prove that any of this personal property not railroad equipment and not logging equipment was not bought with the $215,-000.00, then the J. K. Lumber Company is accountable for its value at the time it was taken, provided, however, that this court shall render only such decree as shall be just and equitable under all the circumstances.

This brings us to the question whether plaintiff has maintained the burden of proof and shown with respect to a single item of property of this class: (1) That it was not bought with the $215,000.00. (2) That it was on the property when the J. K. Lumber Company took possession under the forfeiture clause. (3) Its value at that time.

We assert that the plaintiff has failed in establishing a single one of these necessary elements of his case.

We wish first of all to answer the absurd contention of counsel that because in some, or perhaps a good many instances, Dodge embezzled the money of the J. K. Lumber Company derived from the sale of its bonds and turned over to him on the strength of his vouchers as expenditures made or to be made, the property to that extent was not bought with the $215,000.00. The Circuit Court of Appeals has held that this money was our money and that Dodge in buying this property for development was doing so as our agent. If the money had been applied in each case to pay for the articles specified in the vouchers, counsel for plaintiff would not of course make this point. What he asks this court to do is to sanctify the embezzlement by Dodge of our money and enable Dodge to build up legal rights upon the basis of such embezzlement.

We must not lose sight of the fact that this is a case where the trustee in bankruptcy stands squarely in the shoes of Dodge. It is not one of those exceptional cases—as for instance the case of a fraudulent or preferential transfer where the trustee has a right superior to that of the bankrupt. On the plainest principles of justice as between Dodge and the J. K. Lumber Company each asserting a right to this property, Dodge is estopped to claim that he diverted the money from the purpose for which it was turned over to him. Whether he ever paid for the property at all and whether he used a dollar of our money to pay for it is wholly immaterial.

The procedure employed in getting the money from the hands of the trustee for the bondholders in Chicago into the hands of Dodge in Portland was for Dodge to present to the J. K. Lumber Company vouchers of expenditures made or to be made. These were reported in summary form to the trustee, the money sent by him to the J. K. Lumber Company and then turned over to Dodge. The J. K. Lumber Company voluntarily turned over to counsel for plaintiff all of these vouchers it was able to find. They total about $147,000.00. It is, however, only fair to state that two large payments were made without any vouchers being presented by Dodge to the J. K. Lumber Company, to-wit: $23,000.00 for the purchase of steel rails, and later $10,000.00 for the purchase of steel rails from Brady & Company. Adding this item of $33,000.00 to $147,000.00 makes the total vouchers before this court, $180,000.00. It follows that there are vouchers to the extent of $35,000.00 missing. See also the following evidence on this feature of the case: (Tr. Ev. this case, Oct. 18, 1920, pages 101-102-133-134. Evidence of F. A. Kribs, pages 3 to 5. See also the footings of the vouchers themselves.)

It appears from the testimony that when Mr. Jones and Mr. Kribs were in the suit in the State Court this plaintiff by a subpoena duces tecum had a great mass of papers of the J. K. Lumber Company brought into court, and the evidence of Jones and Kribs is that when the papers that were not put in evidence in that case were returned, in

some way a large number of these vouchers had disappeared. This condition has been brought about by the act of the plaintiff himself, not of course intentionally. (Ev. of Kribs, 4-5.) We have a case, therefore, where the well-settled rule of law relating to actions of account is applicable. That rule is correctly stated in Vol. 1, Corpus Juris, 628.

It is perfectly clear that it is impossible for this court to pick out any piece of personal property and say with respect to it under the evidence in this case that this property was taken by the J. K. Lumber Company and was not paid for out of the $215,000.00.

Repeatedly during the taking of testimony the court stated that the only means of determining what personal property was on the ground when the J. K. Lumber Company took possession was by an inventory taken at the time, and then by competent evidence showing the value of the different articles. This, of course, would only be a step in the making out of a case, as it would still be necessary to show what articles of personal property so identified and valued were not paid for out of the $215,000.00.

This then brings us to the question of the inventories. Mr. Babcock has testified that he did not take an inventory with Mr. Lilly, but took an inventory of his own sometime before. When, however, he was confronted with Mr. Lilly's testimony to the effect that the inventory was taken at the time by the two jointly, Mr. Babcock had his

memory refreshed and accepted Mr. Lilly's statement as true. Mr. Lilly was not examined before this court, but was a witness in the State Court, and his evidence in the State Court was upon the original trial of this case made a part of the record in this case. His evidence is found at pages 2408 to 2414 of transcript of evidence in the State Court and is in substance as follows:

At the time the J. K. Lumber Company took possession an inventory of all of the property was made by himself and Babcock, he (Lilly) calling off the property and Babcock setting it down in a book. He further testified that the inventory which he identified as Exhibit 73 in the State Court was a copy made by himself from the inventory as it was set down in the book by Babcock. This Exhibit 73 is a part of the record in this case and does not contain a single item of valuation.

Mr. Babcock thought he at some time set down values in this book; but it is a remarkable fact that this book has never been produced by the plaintiff, either on the trial in the State Court or on this trial, although Mr. Lilly testified that it was delivered back to Babcock, who was in the employ of Dodge after he (Lilly) had made the copy—Exhibit 73.

Counsel for plaintiff undoubtedly believing his statement to be true asserted on this hearing that this original inventory was introduced in evidence in the State Court, and I promptly denied the statement because I know it is not true. (Tr. Ev. this court, Oct. 18, 1921, pages 90-91.)

A reference to the record in the State Court, which has been made a part of the record in this case, will show that while this original inventory was called for by the defendants in the State Court, it was never produced by the plaintiff. (Tr. Ev. State Court, 2412.) We challenge counsel to produce it.

Indeed Mr. Babcock testified in the State Court that the only two inventories he had were the inventory relating to the Yale logging equipment and the inventory relating to the commissary supplies, etc. (Tr. Ev. State Court, 1857-1858-1873 to 1875.)

Even if Babcock took an inventory sometime before the J. K. Lumber Company took possession, this would not shed light upon the property there when the company took possession; and, furthermore, no such inventory is in evidence before the court and no one knows what it contains. But the undoubted fact is that Babcock in this respect was drawing on his imagination, as he did repeatedly in his testimony, showing a reckless indifference to the truth, and that the inventory with which he had something to do was the inventory which Lendholm took in January, 1914, and which he admits he had something to do with. (Tr. Ev. State Court, 1857-1858.) (Tr. Ev. this court, Oct. 18, 1920, pages 92-93.)

This Lendholm inventory is entirely worthless. It contains no items with values, but only lump

sums of money; does not show what property was there in May, 1914, and does not enable us to pick out the items of the only class of personal property for which the J. K. Lumber Company is accountable and enables the court to say whether these particular items were or were not bought with the $215,000.00.

This Lendholm inventory made in January contains a large amount of wire cable that was returned afterwards before the J. K. Lumber Company took possession. And yet Mr. Babcock had the nerve to testify that all of the property in the Lendholm inventory was up there when we took possession. Mr. Babcock intended the court to believe that he was very positive on this subject. He testified at page 93, Tr. Ev. on the accounting, as follows:

> "Q. Is there any item at all in that inventory, Mr. Babcock, that was not there on the 12th of May, 1914, which you can see—speaking about Mr. Lendholm's inventory?
>
> "A. No, sir, (looking the items over) **every one of them I would say very strongly and positively were on the ground at that time.**"

And yet on re-cross-examination he had to admit that a large amount of the wire rope that was in the Lendholm inventory was not there when we took possession. (Tr. Ev. this court, 94-95.)

Babcock was also positive about the Bagley scraper, and the witness Hugh L. Cox said it was not there at all.

This is a case where the defendant is in possession of the books and accounts and data, but where on the contrary, all of these things are or should be in the possession of the plaintiff. All we know is that we took possession of certain property and the court has a list of it in the copy of the inventory made from the book in which Babcock set down the items when he and Lilly made an inventory together. Whatever is uncertain in this case is uncertain because the plaintiff, who should be in possession of all this necessary data, has failed to furnish it.

There are only two inventories that shed any light on this case, to-wit: the inventory of the Yale logging equipment received in evidence in the State Court as Exhibit 52, and the inventory of the commissary supplies received in evidence in the State Court as Exhibit 53, and a copy of it appears to be found in the transcript of record on appeal to the Circuit Court of Appeals at pages 270 to 279.

We may dismiss the inventory of the Yale logging equipment for the following reasons: First, this property was paid for out of the $215,000.00; second, it is a part of the logging equipment and therefore within the forfeiture clause.

So far as the other inventory is concerned, we call attention to the fact that there is not the slight-

est evidence to show when any of this property was purchased or that it was not bought out of the $215,000.00. From the very nature of the property a large amount of it must have been on hand for some time before the J. K. Lumber Company took possession.

Furthermore, there is nothing in the evidence to show when this inventory was taken. There is only the testimony of Babcock on the trial in the State Court that it was taken by the storekeeper, Mr. Will. (Tr. Ev. State Court, 1873-74-75.)

Moreover, there is a date on part of this inventory, to-wit: the warehouse inventory, and the date is March 20, 1914. (See Tr. Record C. C. A. 277.)

It is a fair inference that this is the date of all of this inventory; and indeed Babcock in his evidence testifies that these two accounts—the commissary account and the warehouse account—were closed together. At pages 1874-75 Tr. Ev. State Court, we find the following:

"Q. Did you find an inventory of commissary stock?

"A. Yes, I have that here.

"Q. That is the one that was made by Mr. Will?

"A. Yes.

"Q. What is this?

"A. We had two accounts; the warehouse account, and the store account, and they were both closed together as the commissary supply."

But we are wasting our time on points that are perfectly clear. The case is wholly destitute of any evidence that would warrant any recovery.

Moreover, the evidence shows an overwhelming equity in favor of the J. K. Lumber Company that was not adverted to by the Circuit Court of Appeals, to-wit: the loss on the $750,000.00 of bonds that were sold at 91 cents, representing a dead loss to the J. K. Lumber Company of $67,500.00. Laying all other equities aside, this is sufficient to defeat any recovery, even if plaintiff had succeeded in establishing a small financial liability on the theory outlined by the Circuit Court of Appeals. It was on the strength of the Dodge contract and that it would be carried out that the J. K. Lumber Company was willing to face this loss of $67,500.00 on the sale of the bonds, expecting to make it up out of the profits on the contract. Through the breach of the contract by Dodge these profits are lost. If this does not establish an equity within the meaning of the opinion of the Circuit Court of Appeals, we are at a loss to know what would establish such an equity."

By inserting this copy of my brief in the District Court I do not intend to waive my claim that the court cannot go into the merits.

Inasmuch as Jones and Kribs could not appeal from the decision which was in their favor they would of course have the right to insist in this court if the merits of the case were properly before it, that the appellant is not entitled to recover on the ground that appellant has failed to establish any liability at all as well as on the ground that the only defendant that is liable is the J. K. Lumber Company.

With respect to the personal liability of Jones and Kribs, the case is very simple. It is significant that this Court said that they would be liable for only such property as they took in their "**individual capacities,**" and not that they would be liable precisely the same as the J. K. Lumber Company would be liable.

It is necessary at this point to make an important distinction. If this were an action at law for conversion and it appeared that Jones and Kribs, acting as officers of the J. K. Lumber Company, had converted the plaintiff's personal property, they would undoubtedly be liable the same as the corporation, on the familiar principle that an agent cannot protect himself when he commits a tort by invoking the command of his principal. But this is an action for an accounting and proceeds exclusively on the theory of an enrichment of the estate of the defendant at the expense of the plaintiff. A case very much in point is Schall v. Camors, 251 U. S. 239. In that case certain bills of exchange

had been sold and in connection with the sale fraudulent representations had been made, for which the two partners of the firm were responsible, it appearing that they were cognizant of these fraudulent representations. The question was whether this claim for moneys obtained by this fraud could be proven not only against the bankrupt estate of the partnership, but also against the bankrupt estate of each of the individual partners. The court in a unanimous opinion held that the claim could not be proven against the individual partners, using the following language, at page 254, which is very pertinent to the case at bar:

> "It is insisted by petitioners, further, that because the proofs of the individual claims establish the responsibility of each partner for the frauds, they are liable in solido not only as partners, but individually; and that, irrespective of whether the claims are provable in tort for the fraud, they are provable and were properly proved both against the individual partners and against the firm as claims **in quasi contract or equitable debt.** But as the basis of a liability of this character is **the unjust enrichment of the debtor,** and as the facts show that no benefit accrued to the **individuals** as a result of the frauds beyond that which accrued to the firm, the logical result of the argument is that out of **one enrichment there may arise three separate and independent indebtednesses.**" * *

The evidence of Jones and Kribs is undisputed and conclusive that whatever they did was done by them on behalf of the J. K. Lumber Company and as officers of that company. There was not the slightest reason why they should do anything as individuals, because the only right which they could assert to the property was the right which they, as officers of the J. K. Lumber Company, could assert on behalf of that company, because of the contract in question under the forfeiture clause therein. They did not claim to have any contract with Mr. Dodge to take any of his property as individuals, and it is nonsense for anyone to pretend that such an element can be found in this case. It likewise appears undisputed that they have never derived a penny's benefit from any of this property, not even as stockholders, but that on the contrary, they have lost several hundred thousand dollars because of Dodge's breach of his contract.

For the evidence that Jones and Kribs had nothing to do with this property in their individual capacities and never derived any benefit from it, see Tr. Ev. District court, October 18, 1920, pages 129 and 130, and evidence in this court taken before the appeal, pages 2-3-51 to 53-85. See also evidence of Fred A. Kribs, pages 1 to 2, and evidence of witness Hugh L. Cox taken on this accounting, pages 108 and 109. This is not controverted by counsel for appellants. He seeks to place their liability on another ground.

Counsel's theory of the liability of Jones and Kribs is set forth in paragraph XV of the third cause of suit, as follow:

> "That the said J. K. Lumber Company was incorporated by the defendants, Willard N. Jones and the said Fred A. Kribs, and is owned by them exclusively for their own benefit and convenience, and all property held by the said J. K. Lumber Company and transferred to it, including the aforesaid property of the bankrupts, is held by the said corporation for the exclusive use and benefit of the said Willard N. Jones and the said Fred A. Kribs, and all property held, owned or controlled by the said J. K. Lumber Company is held for the exclusive profit and advantage of the said Willard N. Jones and the said Fred A. Kribs." Tr. Rec. Former Appeal, p. 32.

This is, of course, wholly inconsistent with any idea of a tort committed by them individually. It does not base their liability upon anything done by them as officers of the J. K. Lumber Company, but upon the ground that indirectly they would benefit as stockholders by anything that would enrich the estate of the J. K. Lumber Company. We, of course, must dismiss the first two causes of suit, for they both proceed upon the untenable theory that the bankrupts made a preferential transfer to the J. K. Lumber Company. The only cause of suit that has any significance is the third one, and this is based

not upon any tort, but upon the ground that the bankrupts, in fraud of their creditors, consented to the taking possession of certain property under the forfeiture clause. The bankrupts themselves would have no right of action against anyone, they having voluntarily surrendered the possession of the property.

It is to be noted that the prayer for relief in the third cause of suit is for an accounting of the value of the property taken, with the consent of the bankrupts. So far as Jones and Kribs are concerned, no equity for an accounting has been established by the evidence, for it is undisputed that the surrender by the bankrupts was made under a claim made by the J. K. Lumber Company that under the forfeiture clause in the contract, it had the right to the possession of all of this property, and this claim was recognized without protest by the bankrupts. No claim to the property was ever made by either Jones or Kribs. No equity for an accounting against Jones and Kribs having been established, the Federal Court would have no right to retain the case for the purpose of rendering a judgment against them for damages, as in an action at law for tort of conversion. They would have the constitutional right to have this strictly legal action tried before a jury.

Dowell vs. Mitchell, 105 S. W. 430.
Russel vs. Haynes, 130 Fed. 90.
Wheelock vs. Lee, 74 N. Y. 495.
Hawes vs. Dobbs, 33 N. E. 560.
Ming Yue vs. Coos Bay, Etc., Co., 24 Or. 392.

Kramer vs. Cohn, 119 U. S. 355.

No decision by any Court can be found laying down the rule that in a plenary suit in equity brought by a trustee in bankruptcy attacking a voluntary surrender of property by the bankrupt, that the officers and stockholders of the corporation, to which the surrender is made, are all jointly liable to account for property from which they have derived no benefit and which was turned over for the benefit of the corporation, and upon its claim of a right to such property.

No decree should have been rendered against the J. K. Lumber Co. for any amount. But no appeal having been taken by that defendant, that part of the decree will have to stand.

The whole decree should be affirmed.

GUY C. H. CORLISS,
Attorney for Appellees.

No. 3784

United States

Circuit Court of Appeals

For the Ninth Circuit.

ATOLIA MINING COMPANY, a Corporation,
Plaintiff in Error,

vs.

HUMBOLDT COUNTY TUNGSTEN MINES and MILLS COMPANY, a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

Messrs. CHICKERING & GREGORY, Merchants Exchange Bldg., San Francisco, Calif.,
Attorneys for Plaintiff.

JOHN F. DAVIS, Esq., Humboldt Bank Bldg., San Francisco, Calif., and
W. S. ANDREWS, Esq., Newhall Bldg., San Francisco, Calif.,
Attorneys for Defendant.

In the United States District Court, in and for the Southern Division of the Northern District of California, Second Division.

HUMBOLDT COUNTY TUNGSTEN MINES AND MILLS COMPANY, a Corporation,
Plaintiff,

vs.

ATOLIA MINES COMPANY, a Corporation,
Defendant.

Complaint at Law.

Now comes plaintiff above named and complains of defendant above named, and for its first cause of action alleges the following:

I.

That plaintiff is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Nevada, and having its principal place of business in the City of Lovelock, County of Humboldt, said

State, and a citizen and resident of said State, and that defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City and County of San Francisco, said State, and a citizen and resident of said State and Southern Division of the Northern District of California.

II.

That the grounds of jurisdiction of this court are diversity of citizenship and that the matter in controversy and the amount involved in this suit are in excess of the sum or value of three thousand (3,000) dollars, exclusive of interest and costs, to wit, the sum of eight thousand one hundred and fifty and 34/100 (8,150.34) dollars, exclusive of interest and costs. [1*]

III.

That on or about the 29th day of November, 1918, in the said City of Lovelock, County of Humboldt, State of Nevada, plaintiff and defendant herein did make and enter into a contract in writing, wherein and whereby plaintiff did agree to sell and deliver to defendant and defendant did agree to purchase and receive from plaintiff a certain specified lot of that certain mineral commonly known as scheelite concentrates, located at the place of business of said plaintiff in the said City of Lovelock, and having a net weight of 11,893 pounds; that under and by virtue of the terms of said contract, defendant did promise and agree to pay plaintiff for said scheelite

*Page-number appearing at foot of page of original certified Transcript of Record.

concentrates at the following rate, to wit, twenty-one (21) dollars for each and every twenty (20) pounds of tungstic acid contained in said concentrates, and defendant did furthermore promise and agree that the following percentages of the total purchase price thereof would be paid by defendant to plaintiff at the following times, to wit, ninety per cent of the said total purchase price upon an assay by said defendant of samples to be taken from said concentrates and the remaining ten per cent of said purchase price upon the final assay by said defendant of said entire lot; that the terms, conditions and provisions hereinabove in this paragraph set forth constitute all the terms, conditions and provisions expressed in said written contract.

IV.

That subsequent to entering into said contract by plaintiff and defendant, and upon said 29th day of November, 1918, and in accordance with the terms of said contract, plaintiff did deliver to defendant and defendant did accept from plaintiff, at said place of business of plaintiff in the City of Lovelock, County of Humboldt, State of Nevada, said 11,893 pounds of said scheelite concentrates.

V.

That said 11,893 pounds of said scheelite concentrates [2] contained at all times herein mentioned 7,762.238 pounds of said tungstic acid.

VI.

That said plaintiff is informed and believes and therefore alleges that immediately subsequent to said delivery of said scheelite concentrates to de-

fendant, defendant did take and assay samples from said 11,893 pounds of said scheelite concentrates and that furthermore, subsequent to said assay of said samples and prior to the commencement of the above-entitled action, defendant did assay said entire lot of said scheelite concentrates and that both upon said assay of said samples and upon said assay of said entire lot, said 11,893 pounds of said scheelite concentrates were found by defendant to contain 7,762.238 pounds of said tungstic acid.

VII.

That upon said assay of said samples there became due and owing, under and by virtue of the terms of said contract, from said defendant to said plaintiff, ninety per cent of said purchase price, to wit, the sum of seven thousand three hundred and thirty-five and 31/100 (7,335.31) dollars, and that upon said final assay of scheelite concentrates there became due and owing, in accordance with the terms of said contract, from said defendant to said plaintiff, the balance of said purchase price, to wit, the sum of eight hundred and fifteen and 3/100 (815.03) dollars.

VIII.

That plaintiff has performed each and all of the terms, conditions and provisions of said contract to be kept and performed by said plaintiff.

IX.

That subsequent to said assay of said entire lot of said scheelite concentrates, and prior to the commencement of the above-entitled action, plaintiff demanded of defendant that defendant pay [3]

to plaintiff the total amount due plaintiff for and on account of said sale and delivery of said scheelite concentrates, to wit, the sum of eight thousand one hundred and fifty and 34/100 (8,150.34) dollars, but that at said time said defendant refused, and ever since said time has refused and still refuses to pay plaintiff said sum or any part thereof, and that the same has not been paid nor has any part thereof been paid, and that the whole thereof, with interest thereon at the legal rate from the commencement of the above-entitled action is now due, owing and unpaid from defendant to plaintiff.

AND FOR A SECOND, SEPARATE AND DISTINCT CAUSE OF ACTION, plaintiff alleges:

I.

Plaintiff at this point refers to and by such reference incorporates herein paragraphs I and II of the first cause of action in this complaint contained, and each and every allegation thereof, as fully and to the same effect as if here rewritten and set forth at length.

II.

That on or about the 29th day of November, 1918, in the said City of Lovelock, County of Humboldt, State of Nevada, plaintiff did sell and deliver to defendant and defendant did receive and purchase from plaintiff a certain specified lot of that certain mineral commonly known as scheelite concentrates, located at the place of business of said plaintiff in said City of Lovelock, and having a net weight of 11,893 pounds; that for and in consideration of said

sale and transfer by plaintiff to defendant of said 11,893 pounds of said scheelite concentrates, defendant did in writing promise and agree as follows, to wit, that *plaintiff* would pay for said scheelite concentrates at the rate of twenty-one (21) dollars [4] for each and every twenty (20) pounds of tungstic acid contained in said concentrates, and furthermore that defendant would pay the following percentages of the total purchase price at the following times, to wit, ninety per cent of the said total purchase price upon an assay by said defendant of samples to be taken from said concentrates, and the remaining ten per cent of said purchase price upon the final assay by said defendant of said entire lot.

III.

Plaintiff at this point refers to and by such reference incorporates herein paragraphs V, VI, VII and IX of the first cause of action in this complaint contained, and each and every allegation thereof, as fully and to the same effect as if here rewritten and set forth at length.

AND FOR A THIRD, SEPARATE AND DISTINCT CAUSE OF ACTION, plaintiff alleges:

I.

Plaintiff at this point refers to and by such reference incorporates herein paragraphs I and II of the first cause of action in this complaint contained, and each and every allegation thereof, as fully and to the same effect as if here rewritten and set forth at length.

II.

That on or about the 29th day of November, 1918, plaintiff did sell and deliver to defendant, at the special instance and request of defendant, certain goods, wares and merchandise, as follows, to wit, 11,893 pounds of that certain mineral commonly known as scheelite concentrates; that said goods, wares and merchandise were and are reasonably worth the sum of eight thousand one hundred and fifty and 34/100 (8,150.34) dollars. [5]

III.

That although payment of said sum of eight thousand one hundred and fifty and 34/100 (8,150.34) dollars has been often demanded, the same has not been paid, nor has any part thereof been paid, and the whole thereof, with interest thereon at the legal rate from the commencement of the above-entitled action is now due, owing and unpaid from defendant to plaintiff.

WHEREFORE plaintiff prays judgment against defendant for the sum of eight thousand one hundred and fifty and 34/100 (8,150.34) dollars, together with interest thereon at the legal rate from the commencement of the above-entitled action and for its costs of suit herein.

CHICKERING & GREGORY,
Attorneys for Plaintiff. [6]

State of California,
City and County of San Francisco,—ss.

Donald Y. Lamont, being first duly sworn, deposes and says:

That he is a member of the law firm of Chickering

& Gregory, the attorneys for the plaintiff named in the foregoing complaint; that said plaintiff is a foreign corporation and said plaintiff and its officers and agents are absent from the State and Northern District of California and from the City and County of San Francisco, the place where said attorneys have their offices, and for that reason affiant makes this affidavit on plaintiff's behalf; that affiant has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

DONALD Y. LAMONT.

Subscribed and sworn to before me, this 5th day of May, 1919.

[Notarial Seal] CHARLES EDELMAN,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires April 7, 1922.

[Endorsed]: Filed May 5, 1919. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [7]

In the United States District Court, in and for the Southern Division of the Northern District of California, Second Division.

No. 16,243.

HUMBOLDT COUNTY TUNGSTEN MINES AND MILLS COMPANY, a Corporation, Plaintiff,

vs.

ATOLIA MINES COMPANY, a Corporation, Defendant.

Answer to Complaint at Law.

That defendant Atolia Mining Company, a California corporation, sued herein as Atolia Mines Company, hereby appears and answers the complaint filed in the above-entitled action and for ANSWER TO THE FIRST CAUSE OF ACTION herein alleged, denies, admits and alleges as follows:

I.

Said defendant admits all of the allegations set forth in paragraph I of said complaint.

II.

Said defendant admits all of the allegations set forth in paragraph II of said complaint.

III.

Said defendant denies that on or about the 29th day of November, 1918, or at any other time, in the City of Lovelock, County of Humboldt, State of Nevada, or anywhere else, plaintiff and defendant

herein did make or enter into a contract in writing, or otherwise, wherein or whereby plaintiff did agree to sell or deliver to defendant, or that defendant did agree to purchase or receive from plaintiff, a certain specified or any lot of certain mineral commonly known as scheelite concentrates, located at the place of business of said plaintiff in said City of Lovelock, or elsewhere, or having a net or other weight of 11,893, or any other number of, pounds, or any concentrates at all. And in this [8] behalf said defendant denies that it ever entered into any agreement of any kind with plaintiff whatever. Said defendant denies that under or by virtue of the terms of the contract alleged in said complaint, or under or by virtue of the terms of any contract, defendant did purchase, or agree to pay to plaintiff for, the said scheelite concentrates set forth in said complaint, or for any scheelite concentrates, at the rate of twenty-one, or any other number of, dollars for each and every twenty pounds of tungstic acid contained in said concentrates, or that defendant did further promise or agree that the percentages of the total alleged purchase price thereof, to wit, ninety or any per cent of said total purchase price upon an assay of said defendant of samples to be taken from said concentrates and the remaining ten or other per cent of said purchase price upon the final assay of said defendant upon said entire lot, would be paid by defendant to plaintiff at the times set forth in said paragraph of said complaint, and in this behalf said defendant denies that it ever did promise or agree to pay said plaintiff any amount

of dollars for any number of pounds of tungstic acid contained in any concentrates, or that it ever agreed to pay defendant any percentages of any purchase price thereof at any time. Said defendant denies that the terms or conditions or provisions set forth in said paragraph three of said complaint constitute all or any of the terms or conditions or provisions expressed in any written contract therein attempted to be set forth, or that there was any written or other contract whatever.

IV.

Said defendant denies that subsequent to the entering into said alleged contract by plaintiff and defendant, or subsequent to any contract, or upon the 29th day of November, 1918, or at any other time, or in accordance with the terms of said alleged contract, or otherwise, or at all, plaintiff did deliver to defendant, [9] or defendant did accept from plaintiff, at said place of business of plaintiff in the City of Lovelock, County of Humboldt, State of Nevada, or any other place, said alleged 11,893 pounds of said scheelite concentrates, or any other amount of scheelite concentrates whatever.

V.

That as to said 11,293 pounds of said scheelite concentrates mentioned in paragraph five of plaintiff's complaint as containing at all times therein set forth 7762.238 pounds of tungstic acid, this defendant has no information or belief sufficient to enable it to deny said allegation, and basing its denial upon said ground, this defendant, therefore, denies that the said 11,893 pounds of said scheelite

concentrates set forth in paragraph V of said complaint contained at all times mentioned in said complaint or at any time 7762.238, or any other number of, pounds of tungstic acid.

VI.

Said defendant denies that plaintiff ever delivered to defendant the scheelite concentrates or any portion thereof mentioned in said complaint; defendant denies that subsequent to said alleged delivery, or at any time, except as herein stated, it did take an assay or take or assay samples from said 11,893 pounds, or any portion thereof, of said scheelite concentrates, and denies that subsequent to said alleged assay of said samples or prior to the commencement of the above-entitled action, defendant, except as herein stated, assayed said entire lot of said scheelite concentrates or any portion thereof, and denies that both upon said alleged assay of said samples and upon said alleged assay of said entire lot or upon an assay of either of them that said 11,893 pounds or any portion thereof of said scheelite concentrates were found by defendant to contain 7762.238 pounds of said tungstic acid or any portion thereof, except as herein stated, and defendant in [10] this connection denies that it made any assay whatever of any scheelite concentrates purchased by it from said plaintiff, or that it ever purchased any concentrates from said plaintiff.

VII.

Defendant denies that upon said alleged assay of said samples, or at any time, there became due and

owing or due or owing under and by virtue or under or by virtue of the terms of said alleged contract or at all from said defendant to said plaintiff ninety per cent of said alleged purchase price, to wit, the sum of $7335.31 or any sum whatever, and denies that upon said alleged final assay of scheelite concentrates or at any time there became due and owing or due or owing, in accordance with the terms of said alleged contract, or at all, from said defendant to said plaintiff, the balance of said alleged purchase price, to wit, the sum of $815.03, or any sum whatsoever.

VIII.

Defendant denies that plaintiff has performed each and all of the terms, conditions and provisions or terms or conditions or provisions of the said alleged contract to be kept and performed or to be kept or performed by said plaintiff, and denies that plaintiff and defendant ever entered into any agreement covering the purchase of any scheelite concentrates from plaintiff.

IX.

Defendant denies that any sum of money whatsoever is due from it to the plaintiff.

ANSWER TO SECOND ALLEGED CAUSE OF ACTION.

Answering the second cause of action of said plaintiff defendant admits, denies and alleges as follows, to wit:

I.

Defendant denies that on or about the 29th day of

November, [11] 1918, or at any time, in said City of Lovelock, County of Humboldt, State of Nevada, or at any place, plaintiff sold or delivered to defendant, and denies that defendant received and purchased, or received or purchased, from plaintiff, a certain specified lot of that certain mineral commonly known as scheelite concentrates, located at the place of business of said plaintiff in said City of Lovelock, and having a net weight of 11,893 pounds or any amount of weight whatever; denies that it ever purchased or received from plaintiff any scheelite concentrates whatever at any time or place; denies that for or in consideration of said alleged sale and transfer, or said sale or transfer, by plaintiff to defendant of said 11,893 pounds, or any portion thereof, of said scheelite concentrates, defendant did in writing, or otherwise, promise and agree, or promise or agree, that it would pay for said scheelite concentrates at the rate of twenty-one dollars or any other sum for each and every twenty pounds or any amount thereof of tungstic acid contained in said concentrates, and furthermore denies that it agreed to pay any sum of money whatever at any time for said concentrates, and denies that it ever entered into any agreement with the plaintiff for the purchase of any concentrates whatsoever from the plaintiff.

II.

Defendant refers to and by such reference incorporates herein paragraphs five, six, seven and nine of the answer to the first cause of action in this answer contained and each and every allegation

thereof as fully and to the same effect as if here rewritten and set forth at length.

ANSWER TO THIRD ALLEGED CAUSE OF ACTION.

Answering the third cause of action defendant admits, denies and alleges as follows:

I.

Defendant denies that on or about the 29th day of November, [12] 1918, or at any time, plaintiff sold and delivered, or sold or delivered, to defendant at its special instance and request, or at its special or other instance or request, certain goods, wares and merchandise or certain goods, wares or merchandise, as follows, to wit, 11,893 pounds of that certain mineral commonly known as scheelite concentrates or any portion thereof; and denies that it ever purchased from plaintiff any goods, wares or merchandise whatsoever; denies that said goods, wares and merchandise alleged in said complaint were and are, or were or are, reasonably worth the sum of $8150.34 or any sum whatsoever.

II.

Denies that the sum of $8150.34 or any portion thereof or any interest thereon is now due or owing from the defendant to the plaintiff.

FIRST SEPARATE CAUSE OF DEFENSE.

And for a separate defense to the complaint herein and to each count thereof defendant alleges as follows:

I.

The defendant is a corporation organized and ex-

isting under and by virtue of the laws of the State of California and having its principal place of business in the City of San Francisco in said State, and that its correct name is Atolia Mining Company.

II.

That defendant is informed and believes and therefore alleges that plaintiff is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Nevada and having its principal place of business in the City of Lovelock, County of Humboldt, in said State.

III.

That defendant is informed and believes and therefore alleges [13] that some time in the month of November, 1918, the plaintiff entered into an agreement with one W. H. Shewan whereby the said Shewan purchased from the plaintiff the scheelite concentrates referred to in said complaint hrein, and that the said agreement of sale referred to in said complaint herein and each count thereof was entered into between said plaintiff and said Shewan and not between said plaintiff and defendant; that defendant is informed and believes and therefore alleges that prior to the making of said agrement as aforesaid between said plaintiff and said Shewan, in order to induce said Shewan to enter into said agreement, said plaintiff represented to said Shewan that the scheelite concentrates referred to in said complaint and which plaintiff desired to sell to said Shewan contained more than sixty per cent (60%)

of tungstic acid and that said scheelite concentrates were absolutely free from all impurities including phosphorus, sulphur and copper, and that said Shewan could rely upon said representation; that said plaintiff was engaged in the business of milling tungsten ore and was in a position to know the quality of the ore it was offering for sale; that at the time said plaintiff made said representation it had no reasonable ground for believing said representation to be true; that at the time it made said representation plaintiff knew that said representation was not true and that said tungsten ore was not free from impurities and that it did not contain more than sixty per cent (60%) of tungstic acid; that said Shewan relying upon said representation of plaintiff then purchased said scheelite concentrates from said plaintiff; that said Shewan informed the plaintiff at the time that said representations were made, as aforesaid, that he, said Shewan, intended to sell said ore when purchased to the defendant and that defendant would not purchase said ore from him unless it were free from impurities and contained over sixty per cent (60%) of tungstic acid; that said [14] plaintiff made the aforesaid representations knowing that the defendant would rely thereon in purchasing said scheelite concentrates from said Shewan; that said defendant did purchase said scheelite concentrates from said Shewan relying upon the aforesaid representation made by said plaintiff to said Shewan.

That thereafter said plaintiff delivered to said Shewan the scheelite concentrates referred to in the

complaint herein who in turn sold and delivered the same to defendant, and after said scheelite concentrates were received by defendant an assay thereof was made, and it was then discovered that they contained a large percentage of phosphorus, sulphur and copper; that immediately thereafter said plaintiff was notified that said scheelite concentrates were not in accordance with the representation and warranty of the plaintiff and that the said sale was rescinded and that the said plaintiff could have the return of said scheelite concentrates upon the payment by said plaintiff of the freight incurred in transporting said scheelite concentrates.

SECOND SEPARATE CAUSE OF DEFENSE.

And for a separate defense to the complaint herein and to each count thereof defendant alleges as follows:

I.

That defendant is a corporation organized and existing under and by virtue of the laws of the State of California and having its principal place of business in the City and County of San Francisco in said State, and that its correct name is Atolia Mining Company.

II.

That defendant is informed and believes and therefore alleges that plaintiff is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Nevada and having its principal place of business in the [15] City of Lovelock, County of Humboldt, in said State.

III.

That defendant is informed and believes and therefore alleges that some time in the month of November, 1918, the plaintiff entered into an agreement with one W. H. Shewan whereby the said Shewan purchased from said plaintiff the scheelite concentrates referred to in said complaint herein, and that the said agreement of sale referred to in said complaint herein and each count thereof was entered into between said plaintiff and said Shewan and not between said plaintiff and defendant; that defendant is informed and believes and therefore alleges that prior to the making of said agreement as aforesaid between said plaintiff and said Shewan, in order to induce said Shewan to enter into said agreement, said plaintiff represented to said Shewan that the scheelite concentrates referred to in said complaint and which plaintiff desired to sell to said Shewan contained more than sixty per cent (60%) of tungstic acid and that said scheelite concentrates were absolutely free from all impurities including phosphorus, sulphur, and copper, and that said Shewan could rely upon said representation; that said plaintiff was engaged in the business of milling tungsten ore and was in a position to know the quality of the ore it was offering for sale; that at the time said plaintiff made said representation it had no reasonable ground for believing said representation to be true; that at the time it made said representation plaintiff knew that said representation was not true and that said tungsten ore was not free from

impurities and that it did not contain more than sixty per cent (60%) of tungstic acid; that said Shewan relying upon said representation of plaintiff then purchased said scheelite concentrates from said plaintiff; that said Shewan informed the plaintiff at the time that said representations were made, as aforesaid, that he, said [16] Shewan, intended to sell said ore when purchased to the defendant and that defendant would not purchase said ore from him unless it were free from impurities and contained over sixty per cent (60%) of tungstic acid; that said plaintiff made the aforesaid representation knowing that the defendant would rely thereon in purchasing said scheelite concentrates from said Shewan; that said defendant did purchase said scheelite concentrates from said Shewan relying upon the aforesaid representation made by said plaintiff to said Shewan.

That thereafter said plaintiff delivered to said Shewan the scheelite concentrates referred to in the complaint herein who in turn sold and delivered the same to defendant, and after said scheelite concentrates were received by defendant an assay thereof was made and it was then discovered that they contained a large percentage of phosphorus, sulphur and copper and contained less than sixty per cent (60%) of tungstic acid;

That by reason of the foregoing the defendant has been damaged in the sum of Ten Thousand Dollars.

THIRD SEPARATE CAUSE OF DEFENSE.

And for a separate defense to the complaint here-

in and to each count thereof defendant alleges as follows:

I.

That defendant is a corporation organized and existing under and by virtue of the laws of the State of California and having its principal place of business in the City and County of San Francisco in said State, and that its correct name is Atolia Mining Company.

II.

That defendant is informed and believes and therefore alleges that plaintiff is and at all times herein mentioned was a corporation [17] organized and existing under and by virtue of the laws of the State of Nevada and having its principal place of business in the City of Lovelock, County of Humboldt, in said State.

III.

That defendant is informed and believes and therefore alleges that sometime in the month of November, 1918, the plaintiff entered into an agreement with one W. H. Shewan whereby the said Shewan purchased from said plaintiff the scheelite concentrates referred to in the complaint herein, and that the said agreement of sale referred to in said complaint herein and each count thereof was entered into between said plaintiff and said Shewan and not between said plaintiff and defendant, though it is the contention and position of the plaintiff that the said Shewan was acting as an agent for this defendant; that defendant is informed and believes and therefore alleges that

prior to the making of said agreement as aforesaid between said plaintiff and said Shewan, in order to induce said Shewan to enter into said agreement, said plaintiff represented to said Shewan that the scheelite concentrates referred to in said complaint and which plaintiff desired to sell to said Shewan contained more than sixty per cent (60%) of tungstic acid and that said scheelite concentrates were absolutely free from all impurities including phosphorous, sulphur and copper, and that said Shewan could rely upon said representation; that said plaintiff was engaged in the business of milling tungsten ore and was in a position to know the quality of the ore it was offering for sale; that at the time said plaintiff made said representation it had no reasonable ground for believing said representation to be true; that at the time it made said representation plaintiff knew that said representation was not true and that said tungsten ore was not free from impurities and that it did not contain more than sixty per cent (60%) of tungstic acid; that said Shewan relying [18] upon said representation of plaintiff then purchased said scheelite concentrates from said plaintiff.

That thereafter said plaintiff delivered to said Shewan the scheelite concentrates referred to in the complaint herein who in turn sold and delivered the same to defendant, and after said scheelite concentrates were received by defendant an assay thereof was made, and it was then discovered that they contained a large percentage of phos-

phorus, sulphur and copper; that immediately thereafter said plaintiff was notified that said scheelite concentrates were not in accordance with the representation and warranty of the plaintiff and that the said sale was rescinded and that the said plaintiff could have the return of said scheelite concentrates upon the payment by said plaintiff of the freight incurred in transporting said scheelite concentrates.

That it is the contention of plaintiff herein that said Shewan was the agent of said defendant and that acting on behalf of this defendant purchased said scheelite concentrates from said plaintiff; that defendant alleges that said Shewan at no time acted as its agent and defendant alleges that at no time was said Shewan authorized to represent it or to make any contract with the plaintiff or anyone else on its behalf; that said Shewan did not enter into any agreement with plaintiff on behalf of defendant; that in the event, however, that plaintiff's contention that said Shewan was the agent of said defendant and entered into said agreement as set forth in said complaint on behalf of said defendant should be sustained, defendant presents as a defense to said complaint and to each cause of action contained therein the aforesaid misrepresentation and the rescission of said contract of sale as hereinbefore set forth.

FOURTH SEPARATE CAUSE OF DEFENSE.

And for a separate defense to the complaint herein and to each count thereof defendant alleges a follows: [19]

I.

That defendant is a corporation organized and existing under and by virtue of the laws of the State of California and having its principal place of business in the City and County of San Francisco in said State, and that its correct name is Atolia Mining Company.

II.

That defendant is informed and believes and therefore alleges that plaintiff is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Nevada and having its principal place of business in the City of Lovelock, County of Humboldt, in said State.

III.

That defendant is informed and believes and therefore alleges that some time in the month of November, 1918, the plaintiff entered into an agreement with one W. H. Shewan whereby the said Shewan purchased from said plaintiff the scheelite concentrates referred to in said complaint herein, and that the said agreement of sale referred to in said complaint herein and each count thereof was entered into between said plaintiff and said Shewan and not between said plaintiff and defendant, though it is the contention and position of the plaintiff that the said Shewan was acting as an agent for this defendant; that defendant is informed and believes and therefore alleges that prior to the making of said agreement as aforesaid between said plaintiff and said Shewan, in order to

induce said Shewan to enter into said agreement, said plaintiff represented to said Shewan that the scheelite concentrates referred to in said complaint and which plaintiff desired to sell to said Shewan contained more than sixty per cent (60%) of tungstic acid and that said scheelite concentrates were absolutely free from all impurities including phosphorus, sulphur and copper, [20] and that said Shewan could rely upon said representation; that said plaintiff was engaged in the business of milling tungsten ore and was in a position to know the quality of the ore it was offering for sale; that at the time said plaintiff made said representation it had no reasonable ground for believing said representation to be true; that at the time it made said representation plaintiff knew that said representation was not true and that said tungsten ore was not free from impurities and that it did not contain more than sixty per cent (60%) of tungstic acid; that said Shewan relying upon said representation of plaintiff then purchased said scheelite concentrates from said plaintiff;

That thereafter said plaintiff delivered to said Shewan the scheelite concentrates referred to in the complaint herein who in turn sold and delivered the same to defendant, and after said scheelite concentrates were received by defendant an assay thereof was made and it was then discovered that they contained a large percentage of phosphorus, sulphur and copper and contained less than sixty per cent (60%) of tungstic acid.

That by reason of the foregoing the defendant has been damaged in the sum of Ten Thousand Dollars ($10,000.00).

That it is the contention of plaintiff herein that said Shewan was the agent of said defendant and that acting on behalf of this defendant purchased said scheelite concentrates from said plaintiff; that defendant alleges that said Shewan at no time acted as its agent and defendant alleges that at no time was said Shewan authorized to represent it or to make any contract with the plaintiff or anyone else on its behalf; that said Shewan did not enter into any agreement with plaintiff on behalf of defendant; that in the event, however, that plaintiff's contention that said Shewan was the agent of said defendant and entered into said agreement as set forth in said complaint on behalf of said defendant should be sustained, defendant presents as a defense to said complaint and to each cause of action contained therein [21] the aforesaid misrepresentation and the breach thereof and the damages therein sustained as hereinabove set forth.

WHEREFORE defendant prays that it be hence dismissed with its costs.

JOHN A. DAVIS,
Attorney for Defendant.

W. S. ANDREWS,
Of Counsel. [22]

State of California,
City and County of San Francisco,—ss.

E. A. Stent, being duly sworn, deposes and says:

That he is an officer, to wit, the Secretary of the Atolia Mining Company, a corporation, and that he is duly authorized to make and does make this affidavit and verification on its behalf; that he has read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

E. A. STENT.

Subscribed and sworn to before me this 14th day of August, 1919.

[Notarial Seal] J. D. BROWN,

Notary Public in and for the City and County of San Francisco, State of California.

Received a copy of the within answer to complaint at law, this 15th day of August, 1919.

Dated August 15, 1919.

CHICKERING & GREGORY,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 15, 1919. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [23]

(Title of Court and Cause.)

(Stipulation Waiving Jury.)

IT IS HEREBY STIPULATED by and between the respective parties hereto that the above-entitled cause may be tried by the above-entitled

court, sitting without a jury, during the July term.

Dated July 27, 1920.

CHICKERING & GREGORY,
Attorneys for Plaintiff.

JOHN F. DAVIS and
W. S. ANDREWS,
Attorneys for Defendant.

It is so ordered.

WM. H. SAWTELLE,
Judge.

[Endorsed]: Filed July 27, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [24]

(Title of Court and Cause.)

Judgment.

This cause having come on regularly for trial upon the 10th day of May, 1921, before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation filed, Donald Y. Lamont, Esq., appearing as attorney for plaintiff and John F. Davis and W. S. Andrews, Esqrs., appearing as attorneys for defendant and the trial having been proceeded with on the 11th day of May, 1921, and oral and documentary evidence having been introduced on behalf of the respective parties, and the cause having been submitted to the Court for consideration and decision, and the Court, after due deliberation, having ordered that judgment be entered in favor of the

plaintiff and against the defendant in the sum of $9,300.90 and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Humboldt County Tungsten Mines and Mills Company, a corporation, plaintiff, do have and recover of and from Atolia Mining Company, a corporation, defendant, the sum of Nine Thousand Three Hundred and 90/100 ($9,300.90) Dollars, together with its costs herein expended taxed at $151.45.

Judgment entered May 11, 1921.

WALTER B. MALING,
Clerk.

A true copy.

[Seal] Attest: WALTER B. MALING,
Clerk.

[Endorsed]: Filed May 11, 1921. Walter B. Maling, Clerk. [25]

(Title of Court and Cause.)

(Clerk's Certificate to Judgment-roll.)

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

ATTEST my hand and the seal of said District Court, this 11th day of May, 1921.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed May 11, 1921. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [26]

(Title of Court and Cause.)

(Subpoena.)

The President of the United States of America to E. C. Voorheis, GREETING:

YOU ARE HEREBY REQUIRED, that all and singular business and excuses being set aside, you appear and attend before the Southern Division of the United States District Court for the Northern District of California, Second Division, to be held at the courthouse of said court, room No. 304, in the United States Postoffice and Courthouse Building, situate on the northeast corner of Seventh and Mission Streets, in the City and County of San Francisco, State of California, on the 10th day of May. A. D. 1921, at ten o'cloock A M., then and there to testify in the above-named cause, now pending in said court, on the part of the above-named plaintiff, and then and there have and then and there bring with you the following, namely:

1. Telegram sent by W. H. Shewan from Lovelock, Nevada, to E. C. Voorheis, bearing date November 21, 1918, in words and figures as follows: "Can buy twelve tons sixty per cent and better for twenty-one fifty per unit f. o. b. Toulon ninety per cent on bill of lading. Answer."
2. Copy of reply of said E. C. Voorheis to said last-mentioned telegram, authorizing purchase, which said reply bears date November 22, 1918.
3. Check sent by defendant to W. H. Shewan and signed by said defendant, in the sum of $7,733.25, which said check bears date February 5, 1919.
4. Copy of letter bearing date February 5, 1919, from E. C. Voorheis to said W. H. Shewan, accompanying said last-mentioned check.
5. Check stub of defendant, showing the drawing of said last-mentioned check by said defendant.
6. Copy of telegram bearing date of February 17, 1919, from said E. C. Voorheis to said W. H. Shewan, addressed to Lovelock, Nevada, instructing the said Shewan to hold up payment to plaintiff.
7. Telegram from plaintiff to said E. C. Voorheis, bearing date March 10, 1919, asking when plaintiff may expect settlement on shipment of concentrates. [27]

8. Telegram bearing date March 19, 1919, from L. A. Savage to said E. C. Voorheis, inquiring whether concentrates have been mixed.
9. Letter from plaintiff to defendant, bearing date March 22, 1919, in reply to letter of March 11, 1919.
10. Statement of account contained in last-mentioned letter.

And for a failure to attend as above required, you will be deemed guilty of contempt of Court, and liable to pay to the party aggrieved all loss and damges sustained thereby.

WITNESS, the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 7th day of May, in the year of our Lord one thousand nine hundred and twenty-one, and of our Independence the 145th.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

MARSHAL'S RETURN.

I have served this writ by copy on A. C. Voorheis, Humboldt Bank Bldg., San Francisco, this 9th day of May, 1921.

J. B. HOLOHAN,
U. S. Marshal.
Chas. Ghun,
Deputy.

[Endorsed]: Filed May 9, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [28]

(Title of Court and Cause.)

Stipulation and Order Re Serving and Filing Bill of Exceptions.

It is stipulated by and on behalf of plaintiff that defendant may be given 20 days' further time within which to make, serve and file its bill of exceptions herein.

Dated: May 23d, 1921.

CHICKERING & GREGORY,
Attorneys for Plaintiff.

Good cause appearing herefor, the defendant is hereby granted twenty days' further time within which to make, serve and file its bill of exceptions herein.

Dated: May 23, 1921.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed May 26, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [29]

(Title of Court and Cause.)

Stipulation and Order Re Serving and Filing Bill of Exceptions.

It is stipulated by and on behalf of plaintiff that defendant may be given 15 days' further time from and after the 12th day of June, 1921, within which to make, serve and file its proposed bill of exceptions herein.

Dated: June 8th, 1921.

CHICKERING & GREGORY,
Attorneys for Plaintiff.

Good cause appearing herefor, the defendant is hereby granted fifteen days' further time from and after the 12th day of June, 1921, within which to make, serve and file its proposed bill of exceptions herein.

Dated: June 18th, 1921.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed June 8, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [30]

(Title of Court and Cause.)

Order Extending Time Beyond Term of Court for Settlement of Bill of Exceptions.

It appearing that the defendant herein has prepared, served and lodged with the clerk of this court its proposed bill of exceptions herein pursuant to the statute and the rules of this Court, and it appearing that the plaintiff has prepared, served and lodged with the clerk of this Court its proposed amendments to said proposed bill of exceptions, pursuant to the provisions of the statute and the rules of this Court, good cause appearing herefor,—

IT IS ORDERED that the time for the settlement, engrossment, and filing of said bill of exceptions in the above-entitled action be, and the same is hereby extended beyond the term of this court

within which cause was tried and the same may be thereafter settled, engrossed, and filed, during the July term of the court.

VAN FLEET,
Judge.

July 14, 1921.

Service of a copy of the within and attached order extending time beyond term of Court for settlement of bill of exceptions, on this day received is hereby admitted.

July 15, 1921.

CHICKERING & GREGORY,
Attorneys for Plaintiff.

[Endorsed]: Filed July 15, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [31]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,243.

Before Hon. WM. C. VAN FLEET, Judge.

HUMBOLDT COUNTY TUNGSTEN MINES and MILLS COMPANY, a Corporation,
Plaintiff,

vs.

ATOLIA MINING COMPANY, a Corporation,
Defendant.

TUESDAY, MAY 10, 1921.

Engrossed Bill of Exceptions to be Used on Defendant's Writ of Error to the United States Circuit Court of Appeals.

BE IT REMEMBERED that the above-entitled action came on duly and regularly for hearing before the above-entitled court on Tuesday, May 10, 1921, Hon. William C. Van Fleet, Judge, sitting without a jury, a jury trial of said action having been duly waived in the writing signed by the parties and filed in the action as required by law.

That this bill of exceptions is presented and is settled as a bill of exceptions in said action.

On the trial of said action Messrs. Chickering & Gregory represented by Donald Y. Lamont, Esq., appeared as attorneys for the plaintiff, and John F. Davis and W. S. Andrews, Esq., as attorneys for the defendant, and thereupon the following proceedings were had: [32]

Testimony of E. C. Voorheis, for Plaintiff.

E. C. VOORHEIS, a witness, called and sworn on behalf of plaintiff, testified as follows:

I reside in San Francisco, and I am the president of the Atolia Mining Company, the defendant in this action, and have been such president since 1916, and held such office during the years 1918 and 1919.

Mr. LAMONT.—I served a subpoena duces tecum on Mr. Voorhies to produce certain documents. First of all, Judge Davis, I want the telegram of November 21.

(Testimony of E. C. Voorheis.)

Mr. DAVIS.—Yes. (Handing telegram to Mr. Lamont.)

Mr. LAMONT.—Q. Mr. Voorheis, I show you here a telegram and ask you whether on or about the date it bears, namely, November 21, 1918, you received that from W. H. Shewan.

A. I received a telegram something like that.

Mr. LAMONT.—I offer this telegram in evidence, and ask that it be marked as our exhibit. It is as follows:

Plaintiff's Exhibit No. 1.

"Lovelock Nevada Nov 21 1918

E. C. Voorheis,

1404 Humboldt Bank Bldg.

San Francisco, Cal.

Can buy twelve tons sixty per cent and better for twenty-one fifty per unit f o b Toulon ninety per cent on bill of lading. Answer.

W. H. SHEWAN."

(The telegram was marked "Plaintiff's Exhibit 1.") [33]

Mr. LAMONT.—Q. I show you here, Mr. Voorheis, a copy of telegram which purports to have been signed by you and sent on or about November 22, 1918, and I ask you whether you sent such a telegram to Mr. Shewan?

A. Yes.

Mr. LAMONT.—I offer this copy in evidence and ask that it be marked "Plaintiff's Exhibit 2." It reads as follows:

(Testimony of E. C. Voorheis.)

Plaintiff's Exhibit No. 2.

"San Francisco, Cal., Nov. 22, 1918.

OFFICE COPY.

W. H. Shewan,

Lovelock, Nevada.

Telegram received. Does this twelve tons include Beck's Lot from Sodaville? He was here yesterday and am to let him know today whether we will take it or not but you can can take the twelve tons if they guarantee it to go sixty per cent or better. Must be free from impurities. Would prefer to to have sample analyzed first. If you can get sample ship immediately by Express to Atolia. They can wire us result.

"E. C. VOORHEIS."

("Charge to Atolia Mining Co.")

The telegram was marked "Plaintiff's Exhibit 2."

Now, Judge Davis, I would like a copy of the letter of February 5, 1919.

(Counsel hands Mr. Lamont copy of letter.) [34]

Mr. LAMONT.—Q. I show you here a letter dated February 5, 1919, and purporting to have been signed by you, and I ask you whether that letter was signed and sent by you to Mr. Shewan.

A. Yes.

Mr. LAMONT.—I offer this letter in evidence, and ask that it be marked "Plaintiff's Exhibit 3." It is on the letter-head of the Atolia Mining Company; dated San Francisco, Cal., U. S. A., February

(Testimony of E. C. Voorheis.)

5, 1919, and addressed to Mr. W. H. Shewan, Toy, via Lovelock, Nevada,

Plaintiff's Exhibit No. 3.

"My dear Shewan:

We enclose you final invoice for 104 sacks concentrates which we suppose you got from the Humboldt County Tungsten Mining & Milling Company. The Final Certificate of Weight and Analysis included in the Certificate we sent you on the Joe Bean Lot which you can show to the people from whom you got this ore.

We are enclosing check for $7,733.25 so that you can settle with these people and square up this Lot.

We can now get your final account made up and will send it to you.

It is hard at this time to make any predictions as to what the future market is going to be. As soon as we get any advice on that score will be glad to let you know. We would like to have you stay at the property any way for a little while until we can determine what is best to do. I am in hopes the market will pick up so that you can start to work again, which I think it will do, but it may not open up before April.

With kind regards, I am,

Yours truly,

E. C. VOORHEIS."

(The letter is marked "Plaintiff's Exhibit #3.")

The COURT.—Let me see that letter; as you read it, there [35] were a few words I didn't understand.

(Testimony of E. C. Voorheis.)

Mr. LAMONT.—There is one word left out, right near the beginning of it, the word "is"; with that word inserted, it would probably make it clearer.

Q. Mr. Voorheis, I show you a check, and ask you whether this check was enclosed in the letter to which we have last referred. A. It was.

Mr. LAMONT.—I offer this check in evidence and ask that it be marked "Plaintiff's Exhibit 4." It is as follows:

Plaintiff's Exhibit No. 4.

"San Francisco, Feb. 5, 1919. 191—. No. 10,631.

THE FIRST NATIONAL BANK OF SAN FRANCISCO. 11–8

Pay to W. H. Shewan, or order, $7733.25—SEVENTY-SEVEN HUNDRED THIRTY-THREE DOLLARS TWENTY-FIVE CENTS.

ATOLIA MINING CO., INC.
By F. W. BRADLEY,
President.
By WALTERS.
By ALEX GRANGER,
Asst. Secretary."

(The check bears the rubber stamp on the face "R. I," and is endorsed as follows: "Pay to the order of FIRST NATIONAL BANK of San Francisco. ATOLIA MINING CO.")

(The check was marked "Plaintiff's Exhibit 4.")

Q. Mr. Voorheis, I show you here a telegram bearing date February 17, 1919, to W. H. Shewan—

The COURT.—I suppose, if you ask them, the

(Testimony of E. C. Voorheis.)

parties from whose possession you get these will admit them.

Mr. ANDREWS.—Yes, your Honor.

Mr. LAMONT.—I offer this for the limited purpose of showing agency. There is something in it by way of affirmative defense.

Mr. ANDREWS.—I suppose, if it is admitted at all, it is admitted for all purposes.

Mr. LAMONT.—There is a matter there that bears on your [36] affirmative defense; I do not want to be bound by it.

The COURT.—I will let it go in.

Mr. LAMONT.—It reads as follows:

Plaintiff's Exhibit No. 5.

"Mt San Francisco Calif 1010AM Feb 17 1919

W. H. Shewan

Lovelock, Nev.

Hold up payment Humboldt County Tungsten Telegraphic advices from east ore not acceptable on account of high phosphor contents Do not give them check Writing.

E. C. VOORHEIS."

(The telegram was marked "Plaintiff's Exhibit 5.")

Cross-examination.

The WITNESS.—I was connected with the Atolia Mining Company as president in the year 1917 and I know W. H. Shewan.

Mr. ANDREWS.—Q. What connection, if any, did he have with the Atolia Mining Company?

(Testimony of E. C. Voorheis.)

The WITNESS.—(Continuing.) He was lessee of the St. Anthony Mines. It is located in Humboldt County, Nevada.

Q. Was the Atolia Mining Company the owner of the St. Anthony mine? A. It was.

Q. I show you here what purports to be a copy of a lease between the Atolia Mining Company and W. H. Shewan, and ask you if you have seen that document before? A. Yes.

Q. Is that a true copy of the lease entered into between W. H. Shewan and the Atolia Mining Company? A. It is.

Q. Is this the lease that you referred to a moment ago when you stated that a lease existed between the Atolia Mining Company and W. H. Shewan?

A. Yes.

Mr. ANDREWS.—I offer this lease as Defendant's Exhibit 1.

Mr. LAMONT.—We object to that as not being a proper subject [37] matter of cross-examination of this witness, dealing with new matter, and, if anything, it is a part of the defendant's case.

The COURT.—It is quite outside the scope of proper cross-examination. Objection sustained. That distinctly introduces a separate feature of your defense, that this purchaser was not your agent.

Mr. ANDREWS.—I realize that, your Honor, but at the same time it did seem to me that in view of the fact that the witness has testified that he was a

(Testimony of E. C. Voorheis.)

lessee, it was only going a step further to show what the lease was.

The COURT.—One is a distinct fact from the other. The fact that he was an agent is an entirely different thing.

To which ruling the defendant then and there excepted.

DEFENDANT'S EXCEPTION No. 1.

The defendant asked that the lease offered in evidence be marked for identification, which was done, and the following is a copy thereof:

Defendant's Exhibit No. 1.

"MINING LEASE.

THIS AGREEMENT OF LEASE, made and entered into this fifteenth day of November, A. D. 1917, by and between Atolia Mining Company, a California Corporation, doing business in the state of Nevada, party of the first part, lessor, and W. H. Shewan, of the City and County of San Francisco, State of California, party of the second part, lessee;

WITNESSETH: That the said lessor for and in consideration of the rents, royalties, covenants and agreements herein reserved, and by the lessee to be paid, kept and performed, has leased, let and demised unto the said lessee for the purpose of mining and for no other purpose, the following described mining property, situate, lying and being in the —— [38] Mining District, in the County of Churchill, State of Nevada, to wit:

Within vertical planes drawn downward through

exterior boundary lines, saving and excepting all extralateral and other rights, privileges and appurtenances appertaining or belonging to adjoining and adjacent claims and properties, all and singular that certain piece or parcel of land known, designated and described as follows, to wit:

The St. Anthony group of tungsten mines.

TO HAVE AND TO HOLD unto the said lessee said demised premises, for the purpose of mining and for no other purpose whatever for the term beginning on the 15th day of November, A. D. 1917, and ending on the 15th day of November, A. D. 1919, at noon, unless sooner forfeited or determined through the violation of any agreement, or covenant, hereinafter contained, reserved or provided, to be kept and performed by said lessee.

IN CONSIDERATION WHEREOF, the said lessee does hereby covenant and agree as follows, to wit:

1. To enter upon said premises and work the same in proper, skillful and minerlike fashion, and in manner necessary to good and economical mining, so as to take out the greatest amount of ore possible with due regard to safety, preservation and development of said premises as a workable mine and to the special covenants hereinafter reserved.

2. To work and mine said premises with at least —— shifts of eight hours each, during each and every month of the continuance of this lease, unless prevented by labor strikes, scarcity of labor or extraordinary mining casualty, and to pay all miners and other laborers employed in and about

said premises and mining operations the customary wages of the district. [39]

Any caving of stopes or obstruction of drifts, levels or any other workings necessary to the continuous operation of said premises or any part thereof resulting from the default or negligence of said lessee by reason of insufficient or improper timbering, shall work an immediate forfeiture of this lease.

3. To well and sufficiently timber with strong, well-fitted and durable timbers all the workings on the premises hereby leased at all points where proper, in accordance with good mining and to properly repair or replace all timberings which may be rendered insufficient by shock of blasting, pressure, water, wear and tear or other cause, and to keep the timber of said workings at all times in good, safe and serviceable condition and to remove no timbering from any portion of said premises, except in so far as may be necessary for repairs, enlargement of workings or rearrangement for the more speedy and economical working of the property.

4. To keep at all times the drifts, shafts, tunnels and other workings accessible and clear of loose rock and rubbish.

5. To make all shafts at least seven feet long by at least four feet wide in the clear and all drifts at least six feet high and four feet wide in the clear.

6. That no levels shall be less than fifty feet apart and that no underhand stoping shall be done on the premises.

7. To occupy and hold as the agent and representative of the lessor, any and all cross or parallel lodes, spurs, veins or mineral deposits of any kind and nature, whatsoever, which may be discovered by said lessee or any person or persons under him in any manner, while working within, upon or from said demised premises, as the property of the lessor, with the [40] privilege to the lessee of working the same as part and parcel of said demised premises subject to all the terms and reservations in this lease contained.

8. To permit the agent or agents of the lessor, its officers and authorized representatives *to* any time to have access to any and all workings upon said premises, for the purpose of sampling and testing the values of any and all ores that may be disclosed in any part of said workings, or upon said premises, or which may be lying on the dumps and for the purpose of inspection and surveying.

9. That he will promptly pay for all labor, material and supplies used and employed by him in connection with such mining operations and that he will deliver to the lessor on the 15th day of each and every month during the continuance of this lease and that on the last day of the term herein provided, a full, true, and correct statement in writing, showing all bills and accounts for labor, material and supplies, used and employed in such mining operations, and that all such bills and accounts have been fully paid, satisfied and discharged, or the amounts due and owing for such labor, materials and supplies, and if any liens be filed, or if

any such indebtedness exists, whether shown on such report or not, the lessor may at its election declare a forfeiture of this lease, as herein provided.

10. That he will not assign or transfer this lease, or any interest, claim or demand thereunder, and that he will not sublet said premises, or any part or parcel thereof, to any other person or persons, without the written consent of the lessor, first had and obtained thereto, and that he will not allow any person or persons, not in privity with the parties hereto to take or hold possession of said premises or any part or parcel thereof, [41] either above or below the surface of the ground, under any pretense whatsoever.

11. That said lessee does further agree to suspend mining operations at any time the said lessor may deem such suspension of said mining operations necessary or expedient from any cause, it being mutually understood and agreed that the said lessee shall be entitled to an extension of this lease for a period equivalent to the duration of any such suspension of said mining operations.

12. It is further mutually agreed and understood by and between the said parties, that in the event the said lessee, his employees, agent or representatives shall at any time during the continuance of this lease make a strike of ore of any importance on said premises, or a strike of increased values in ores theretofore discovered, the same shall be reported by said lessee to said lessor, in writing within twenty-four hours after such strike.

13. Not to mix or adulterate any ores broken

or mined and to classify all ore as directed by the lessor. All ores mined which are of too low grade for present shipment, and which may be extracted from the mine and not disposed of immediately, but thrown on the dump, shall remain the property of and subject to the control and disposition of said lessor. Said lessee shall be chargeable with and pay any loss or expense resulting from any shipment of ore which may prove to be not of payable or salable grade.

14. To notify the lessor, its manager or duly authorized agent wherever ore is ready for shipment, giving the estimated tonnage and value thereof, and it is expressly understood and agreed that all ore extracted from said leased premises shall [42] be shipped in the name of the lessor and shall be treated by and at the mill of the said lessor.

15. It is further agreed and understood that royalties are reserved by the lessor upon all ore extracted and shipped or sold from said demised premises by virtue of this agreement, to be deducted, retained and paid as hereinafter provided.

Said lessee shall be chargeable with any and all loss and expense resulting from any shipment of ore which may prove to be not of a payable grade.

16. All shipping ore shall be shipped with reasonable diligence and all reduction returns shall be made to said Atolia Mining Company, at 1404 Humboldt Bank Bldg., S. F., Cal., and distributed as herein provided.

17. That he will not suffer nor permit the removal from said premises, of any ore or mineral

bearing rock, quartz or earth, of any kind or character, by any person or persons whomsoever, except for the purpose of shipment, treatment and sale by said lessee as hereinbefore provided, it being specifically covenanted, agreed and understood by and between all of the parties hereto that any default, failure or neglect on the part of said lessee to comply with the terms and conditions of this clause specifically stated, strictly and literally, shall work an immediate forfeiture of this lease, and the said lessor shall be immediately released from all obligation, either in law or in equity, thereunder, and the said lessee shall forfeit all and every right, claim and demand whatsoever therein, thereto and thereunder.

18. There is expressly reserved to the lessor and at the option of the lessor, to any of the lessees or prespective lessees of the lessor a right of way through the premises hereby [43] leased for more convenient working or examination of adjacent ground; and there is also expressly reserved to the lessor the right and privilege to do any and all development work on the premises hereby leased, which may be rendered desirable by reason of any litigation or controversy which may arise and which may effect said leased premises or other adjacent property in which the lessor is interested and to use the workings of the lease herein, in prosecuting such development work, and that all ore mined in the prosecution of such development work shall belong to the lessee herein (in so far as the same shall

be taken from the ground hereby leased) subject to the royalty hereinbefore reserved.

19. Lessee agrees to pay his *pro rata* portion of all taxes assessed upon said premises based upon the output therefrom in accordance with the laws of the State of Nevada, during the life of this lease; that is to say: to pay that portion of the taxes assessed upon said premises which the proportion of the proceeds of the ore extracted therefrom retained by the lessee bears to the total of any such tax or assessment, and for the purpose of rendering the above covenant in reference to taxes effectual, it is further covenanted and agreed that the said Atolia Mining Company shall retain two and one-half (2½) per cent of the proceeds of any and all shipments of ore, the said sum to be held by said Company to provide a fund for the payment of said taxes, providing that any portion of funds so retained, remaining after payment of said *pro rata* share of said taxes, shall be paid over to said lessee, at the expiration of this lease.

20. It is expressly covenanted and agreed between the parties hereto, that should any legal proceedings be instituted [44] against parties hereto or either of them which would interfere with the possession and enjoyment of said demised premises, that the lessee shall, under no circumstances, attempt to hold the lessor liable in damages or otherwise to the lessee therefor, on account of such disturbed and interrupted possession and enjoyment.

21. It is expressly understood and agreed that the said lessor reserves the property and right of

property in and to all ores extracted from said premises during the term of this lease.

22. That he will deliver to said lessor on the first day of each and every month, a full, true, and correct statement in writing, showing the names of all persons employed by them upon and about said premises during the preceding month, together with number of shifts worked, the rate per shift and the amount paid each, and that he will promptly discharge any person or persons upon notification from the lessor that the employment of such person or persons is not satisfactory to said lessor, PROVIDED, that at no time shall said lessor demand the discharge of such a number of men as shall seriously interrupt the operations of this lease.

23. Said lessee does hereby furthermore covenant and agree that in case he fail to commence work on said premises as aforesaid, or to work and mine the same continuously, with diligence and in a workmanlike manner, or to keep the same securely timbered, drained, clear and in safe condition, or to allow inspection, sampling or survey thereof, or to furnish true information regarding the same when requested by or for the lessor, or to keep the same from liens or to make monthly settlement for work, services and materials, or to duly notify the lessor when ore is ready for shipment, or to pay [45] loss in shipping undergrade ore as above provided, or shall do any underhand stoping, or assign or sublet any interest in this lease or said premises without the written consent of the lessor, or shall record or allow to be recorded, this lease or any sub-lease

or assignment thereof, or shall in these or any other respects fail to keep and fulfill any and all conditions, covenants or agreements, herein expressed or implied, then and in that case, the term of this lease shall at the option of the lessor expire and it shall be lawful for the lessor, its manager, attorney or other duly authorized agent to declare this lease void and of no effect thereafter and with or without process of law and with or without notice to the lessee to enter upon and take possession of said premises and dispossess all persons occupying the same; and in such case and also at the expiration of this lease by limitation, to wit, at noon of the last day of the term hereby granted as aforesaid, said lessee hereby *agree* to surrender, yield and deliver to the lessor, its successors or assigns, quiet and peaceable possession and enjoyment of said premises, and dump, ore or other mineral detached or broken down from said premises, but still remaining thereon, together with the appurtenances (hoists only excepted, and not gallows frames), including all improvements below the collar of the shaft, in good order and condition, with all drifts, shafts, tunnels, winzes, and other workings and passages clear of loose rock and rubbish and drained and ready for immediate and continuous working, accidents not arising from any negligence alone excepted, without demand or further notice on the 15th day of November, A. D., 1919, at 12 o'clock noon of said day or at any time previous thereto upon demand for forfeiture. [46]

25. Time and Punctuality are of the essence of this agreement.

26. All the operations of the lessee under this

lease shall be so conducted as to fully comply in all respects with the laws of the State of Nevada.

27. As a rental under this lease the lessee agrees to pay rent to the lessor therefor in the following manner: He shall turn over to the lessor all the tungsten concentrates recovered by him from the operation of said property, to be sold by the lessor to the best advantage according to the market conditions at the time received, and from the net returns of such sales after payment of transportation, sampling and assaying charges, the lessor is to retain, in addition to anything hereinbefore provided, royalties based on a sliding scale, as follows: first three months 25 per cent; the next following three months 30 per cent; the next following three months 40 per cent, and to pay over the remainder of the amount obtained from said sales to the lessee, or his order, settlements of amounts of royalties and moneys to be paid over to be upon and out of the receipts of proceeds of said sales.

28. The lessor shall have the right to post upon said property and every part thereof all notices by it deemed necessary to protect it and said property and every part thereof from any liability arising from liens.

This agreement and each and every clause and covenant thereof shall be binding upon and enforceable by the respective successors, heirs, executors, administrators and assigns of the parties hereto. [47]

IN WITNESS WHEREOF the said lessor has duly caused this instrument to be executed and the

said lessee has hereunto set his hand and seal the day and year first above written.

(Signed) ATOLIA MINING COMPANY.
By E. C. VOORHEIS,
Its President.
And by E. A. STENT,
Its Secretary.

Witness to all signatures:
JOHN F. DAVIS.
(Signed) W. H. SHEWAN.

* * * * * * * * *

(Attached:)

State of California,
City and County of San Francisco.—ss.

On this 23d day of November, in the year of one thousand nine hundred and seventeen, before me, J. D. Brown, a notary public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared W. H. Shewan, known to me to be the person described in and who executed the annexed instrument and he acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the City and County of San Francisco, the day and year last above written.

[Notarial Seal affixed here]

(Signed) J. D. BROWN,
Notary Public in and for the City and County of San Francisco, State of California.
Room 206 Humboldt Bank Building.
Phone Douglas 2324.

My commission expires April 4, 1918. [48]
(Attached:)

State of California,
City and County of San Francisco,—ss.

On this 23d day of November, in the year of one thousand nine hundred and seventeen, before me, J. D. Brown, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared E. C. Voorheis and E. A. Stent, known to me to be the president and secretary respectively of Atolia Mining Company, the corporation described in and that executed the within instrument, and also known to me to be the persons who executed it on behalf of the corporation therein named, and they acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the City and County of San Francisco, the day and year last above written.

[Notarial Seal affixed here]

(Signed) J. D. BROWN,
Notary Public in and for the City and County of San Francisco, State of California.
Room 206 Humboldt Bank Building.

My commission expires April 4, 1918.

(#16243. U. S. Dist. Court. Offered by Deft., not Admitted 5/10/21. Maling, Clerk.)"

Testimony of L. A. Savage, for Plaintiff.

L. A. SAVAGE, a witness called and sworn on behalf of plaintiff, testified as follows:

I reside at Toulon, Nevada, and was connected with the Humboldt County Tungsten Mines and Mills Company in 1918 and 1919. In November, 1918, I had dealings with W. H. Shewan, in connection with the purchase and sale of some scheelite concentrates. [49]

Mr. LAMONT.—Q. Who did Mr. Shewan at that time say he was representing?

Mr. ANDREWS.—I object to the question on the ground that the alleged statements of one claiming to be an agent do not bind the principal, and that any admissions or statements made for the purpose of binding a third party are not binding upon him.

The COURT.—The objection is overruled.

A. The Atolia Mining Company. I entered into a contract with regard to the sale of certain scheelite concentrates at that time. They were a specific lot of concentrates already refined and on the floor of the mill. There were two lots of concentrates designated as Lot L–1 and as Lot L–2. Lot L–1 contained 72 sacks. I do not recall the net weight of those sacks to the exact pound. Lot L–2 contained 32 sacks and there were 104 in all.

The signature to the memorandum that is shown me is that of Mr. W. H. Shewan, who signed it on November 29th, the same day that the car was loaded with concentrates, if that is the right date,

(Testimony of L. A. Savage.)

and I think it is. It is the receipt for the concentrates. [50]

Mr. LAMONT.—I offer this document in evidence, and ask that it be marked our exhibit next in order. It reads as follows:

Plaintiff's Exhibit No. 6.

"Lovelock, Nev., Nov. 29th, 1918.

Received from the Humboldt County Tungsten Mines and Mills Company, eleven thousand eight hundred ninety-three pounds scheelite concentrates as follows:

Lot 1—72	sacks.....	8723 Lbs. Net
Lot 2—32	sacks.....	3170 Lbs. Net
104		11893 Lbs. Net

Same being purchased by Atolia Mining Company, @ $21.00 per unit of WO_3, ninety per cent (90%) to be paid upon check assay of control sample, by Atolia Mining Co., final payment of ten per cent to be paid upon final checking and assaying of entire lot.

W. H. SHEWAN.

Witness:

FRANK B. EVANS.

(The document was marked "Plaintiff's Exhibit 6.")

Mr. ANDREWS.—I object to the introduction of that document in evidence on the ground that it is immaterial, irrelevant and incompetent, and on the ground that the statements in there signed by

(Testimony of L. A. Savage.)

W. H. Shewan tending to show that the Atolia Mining Company had purchased this tungsten ore mentioned therein is not binding upon the company, because the statements of a third person as to his power to represent a third party do not bind him without proof of the fact that he was the agent.

The COURT.—I think there is sufficient basis here to admit it at this time.

Mr. ANDREWS.—We take an exception.

DEFENDANT'S EXCEPTION No. 3.

The WITNESS.—(Continuing.) The expression $21 per unit of WO_3 as set forth in the receipt and memorandum of agreement means that "per unit" is the standard of measurement 1 per cent of the [51] WO_3 contents. That means, as I have been informed, tungsten oxide or tungstic acid, and it is the per cent that is contained in the crude ore or the scheelite that the concentrate value is based upon. There are 20 pounds in a unit, or 1 per cent of 2,000 pounds. Mr. Shewan read that memorandum before it was signed. Mr. Shewan asked for a copy and I gave him one.

Mr. LAMONT.—Q. Mr. Savage, do you remember a conversation which occurred on or about February 17, 1919, I believe, at 1404 Humboldt Bank Building, when a Mr. Beck was present part of the time, and Mr. C. B. Nicholls was present all the time, and you and Mr. Voorheis were present all the time?

Mr. ANDREWS.—I object to that; it seems to me that is immaterial, irrelevant and incompetent.

(Testimony of L. A. Savage.)

The COURT.—It may be, but we cannot tell yet. Answer the question.

A. I do.

Mr. LAMONT.—Q. Were these specific concentrates furnishing the subject matter of this case discussed at that time? A. They were.

Q. How did you refer to Mr. Shewan during that conversation?

A. As your Mr. Shewan, or your agent.

Q. Did Mr. Voorheis take any exception to that?

A. He did not. [52]

The WITNESS.—(Continuing.) I received the letter which you show me dated March 11, 1919, and purporting to be signed by E. C. Voorheis.

Mr. LAMONT.—At this time I offer this letter in evidence for the following limited purposes: To show admission or ratification of agency; to show that there was an assay made apparently in accordance with the contract, and for the admission that the assay showed that the ore ran 61.87 per cent of tungsten acid, and that its net weight was 11,904 pounds; in other words, I do not want to anticipate their defense, or be bound by their statement as to the contents.

Mr. ANDREWS.—I suppose the letter should be introduced for all purposes; it is the same question that was before the Court before.

The COURT.—Yes, I think so; let it go in.

Mr. LAMONT.—It reads as follows: [53]

Plaintiff's Exhibit No. 7.

"San Francisco, Cal., U. S. A., March 11, 1919.

Humboldt County Tungsten Mines and Mills Co.,
Lovelock, Nevada.

Gentlemen:

We are just in receipt of your telegram as follows:

> 'Would you advise when we may expect settlement on shipment of eleven thousand eight hundred ninety-three pounds concentrates sold through your company November twenty-ninth We feel reduction company has had ample time to make settlement Also wish to advise weight and assays on this lot as given us by your agent Mr. Shewan Does not check being nine hundred forty-one pounds short on actual net weights and four point eight three low on WO_3 contents.'

And in reply will state that the car in which your ore was shipped has arrived at its destination and the weight is as follows:

Special Lot #8:

104 Sacks, Gross Weight	12,035	lbs.
Tare "	124	"
Net "		
	11,911	"
Moisture .066%	7	"
Net Dry Wt.	11,904	"

(Testimony of L. A. Savage.)

The Analysis was as follows:

WO_3 —61.87%
Phos. — .146%
Sulph.— .397%

I am exceedingly sorry that we allowed you to put this Lot into that car on account of the high phosphor content as it has been rejected on account of not coming up to specifications, consequently we will have to reject your ore, which will now be subject to your order and you will be indebted to us for the freight from shipping point to Niagara Falls.

The whole trouble with this shipment was 32 sacks, which Mr. Savage said was put into this Lot and which ran high in phosphorus [54] and copper and should never have been put in. If it had not been put in your shipment would have been all right. It was the same with the Lot we got from Beck & Bean, they had 18 sacks from De Armond which spoiled his lot, as when they were sampled they were mixed together and it just played the devil. We have not been able to make settlement yet and I do not know just how we are coming out on it. I explained this matter to Mr. Savage when he was here and supposed he would let you know about it.

Yours truly,

E. C. VOORHEIS."

(The letter was marked "Plaintiff's Exhibit 7.")

The WITNESS.—(Continuing.) The first intimation that I received that the Atolia Mining Company was going to deny the agency of Mr. Shewan

(Testimony of L. A. Savage.)

was in March, I think it was, in a letter I received from Mr. Voorheis and I think that was the letter you were just asking me to read. No, I was mistaken, it was the letter of March 20, 1919, and it was about March 20, 1919.

The goods were delivered on November 29, 1918, at Toulon and the delivery was made in my mill. Mr. Shewan took possession of them at that time and the weights were checked at that time. The weights as shown in the memorandum were taken right off the scale weights. As we went through, Mr. Shewan checked, and also myself or one of the men I had working with me checked. The weights as shown in the memorandum were taken from the scale weights. I retained a control-sample of Lot 1 and took it to the office and put it where we kept control-samples and left it there.

The COURT.—Q. What do you mean by a control-sample?

A. When a lot is prepared for shipment, we take a sample and split it down until we get it down to the right size for assay, [55] and one is held in reserve and the other is given or sent for analysis to determine the valuation and percentage of WO_3 content in the samples. The other one would be held for reference for a period of time, sometimes for a year.

Q. I am acquainted with the method of taking samples, but I never heard the word "control-sample"; how does that distinguish it from any other sample?

(Testimony of L. A. Savage.)

A. That was the final sample that controlled the value of the concentrates.

Q. Then you mean an average sample?

A. An average sample, yes; we term it "control-sample."

The WITNESS.—(Resuming.) After the controversy commenced, I gave my sample to Mr. Abbott Hanks for determination, for check. He is a chemist and assayer of San Francisco.

I did not have any control-sample of Lot 2 because Lot 2 was sampled at the time it was shipped and Mr. Shewan got the control-sample. The reserve sample was mislaid or destroyed, or something, at the mill; but Mr. Shewan got the control-sample. Whether he took both of them, or not, I do not know. I had none of them left.

I gave Shewan samples of Lot 1. Mr. Shewan stated subsequently that the Atolia Mining Company had made an assay, so far as tungsten content is concerned, as to these two lots.

Mr. LAMONT.—There is no question but what we demanded payment from you, is there? Is there any point made on that?

Mr. ANDREWS.—No point on that.

The WITNESS.—(Resuming.) We have never received any payment for any of these concentrates. The reasonable value of Lot 1 in November, 1918, was about $25 per unit.

Cross-examination.

The WITNESS.—I had a conversation with Mr. [56] Shewan relative to the purchase by him of

(Testimony of L. A. Savage.)

the tungsten concentrates involved in this action. I first had that conversation prior to November 29th. I cannot just recall what day it was but it was several days before the shipment was prepared. I would not say it was prior to November 21st. It might be a few days one way or the other, but it was several days before the shipment was prepared. The conversation took place at my house, at Toulon.

I never had any conversation with Mr. Shewan relative to tungsten concentrates at the St. Anthony mine. I never had any conversation with Mr. Shewan with reference to his purchasing any portion of the 12 tons involved in this action at the St. Anthony mine.

The only conversation that I ever had with Mr. Shewan relative to this shipment was one time, a month or two afterwards, I called at the mill. That was the only time I ever had a conversation with Mr. Shewan at the St. Anthony mill or mine.

Several days before November 29th I had a conversation with Mr. Shewan relative to the purchase of this ore. It occurred at my house at Toulon. I was in bed laid up at that time. I don't recall any telephonic conversation with Mr. Shewan relative to the purchase by him of this ore. I had two conversations with him relative to the purchase of it but I do not recall any telephoning.

The first conversation, as I stated, was somewhere possibly a week, or four days, or three, or five, or six days, or something like that before the shipment was prepared; he came to the mill and then came to

(Testimony of L. A. Savage.)

the house and asked for me. I was in bed that day. He came into my bedroom. He wanted to know if we had any concentrates that he could get to include in this carload, as he was making up a carload and would like to ship the full car. At that time I told him what we had. Our conversation was [57] mostly on price, he offering me $23.50 per unit. I told him I could not give him a definite answer on it, but I thought it would be acceptable, but that I would have to wire Chicago. "Well," he says, "I can't say definitely, either, I will have to wire my people." I wired the Chicago office and got an answer to accept. He came back the next day, or the day after that, and stated that he had received word from his people, the Atolia Mining Company, and all he was authorized to offer was $21 a unit, and I accepted it. Then the car was *set* in a day or two after that and Mr. Shewan came up and we loaded the concentrates.

Q. Mr. Savage, do you remember calling upon Mr. Shewan on or about the 20th day of November, at the St. Anthony mines, in your car, for the purpose of selling to him six tons of tungsten concentrates, and offering to sell him six tons at that time?

Mr. LAMONT.—I object to the question as immaterial, irrelevant and incompetent, and not proper cross-examination.

Mr. ANDREWS.—He just stated he had no conversation with Mr. Shewan except at Toulon; I am now directing his attention to a conversation which

(Testimony of L. A. Savage.)

we believe took place at the St. Anthony mine. It is very important.

The COURT.—But it is not in cross-examination, because nothing was asked him about it on direct. You are opening up a subject yourself and then claiming you have the right to follow it up. If it is not in cross-examination of what he testified to on direct, it does not widen your right.

Mr. ANDREWS.—I realize that, your Honor, but he said he entered into a contract with him at Toulon.

The COURT.—Yes, and he produces the writing. You are familiar with the rule, of course, that that concludes all [58] previous negotiations.

Mr. ANDREWS.—If it were merely a contract between the parties, your Honor, yes, but this is not a contract between the parties to this action.

The COURT.—When you come to make out your case, you can show that the alleged agent was not your agent at all. That is your right.

Mr. ANDREWS.—But the question is, your Honor, whether or not he had—

The COURT.—I will sustain the objection.

Mr. ANDREWS.—I note an exception.

DEFENDANT'S EXCEPTION No. 5.

The COURT.—This does not at all preclude you from going into any proper subject at the proper time; I am not going to violate the rules of evidence to permit you to put in your case under the guise of cross-examination.

Mr. ANDREWS.—I realize that, your Honor.

(Testimony of L. A. Savage.)

I appreciate your Honor's attitude. I think it is a close question.

The COURT.—I don't. I think it is a broad one.

The WITNESS.—(Continuing.) Mr. Shewan did not state at the time of the signing of the receipt which has been introduced in evidence here that he had no authority to sign any document binding the Atolia Mining Company. He did not ask me to explain to him what I meant by stating in the document that the goods were sold to the Atolia Mining Company. I do not recall that any other document was signed by Mr. Shewan at the time of the signing of the receipt which has been introduced in evidence and I do not believe there was. As far as my recollection goes, I gave him this one document, the receipt, to sign and he signed it and the only document that was signed by Mr. Shewan on November 29th [59] was "Plaintiff's Exhibit 6."

Testimony of Prentiss T. Bee, for Plaintiff.

PRENTISS T. BEE, a witness, called and sworn on behalf of plaintiff, testified as follows:

I live in Oakland; I am in business in San Francisco; I am and have been since October, 1912, chief chemist for Abbott A. Hanks, 624 Sacramento Street, San Francisco. Mr. Hank's business is chemistry and assaying. [60] We received on or about February 9, 1920, from the Humboldt County Tungsten Mines and Mills Company a control-sample of scheelite concentrates, marked "L–1."

(Testimony of Prentiss T. Bee.)

I analyzed that sample as to tungstic acid content and found the content to be 66.83 per cent WO_3.

Cross-examination.

The WITNESS.—I received the sample for examination in February, 1920. I examined the sample for other things than tungsten; I examined it for phosphorus, copper, and sulphur. The sample that was given to me was marked "L–1." I don't recall receiving any sample marked "L–2."

Testimony of Frank B. Evans, for Plaintiff.

FRANK B. EVANS, a witness, called and sworn on behalf of plaintiff, testified as follows:

I reside in Winnemucca, Nevada, and was connected, during the years 1918 and 1919, with the Humboldt County Tungsten Mines and Mills Company, at Toulon. I signed as a witness "Plaintiff's Exhibit 6" in this case. Mr. Shewan read over that memorandum of agreement before signing it, and I signed it as a witness. It was at this time that the concentrates furnishing the subject matter of this suit were delivered and they were in the car. I was in and out of the mill at the time they were checking the weight. I did none of the checking. I did not see all the weights taken at that time, though I saw some of them. I saw the concentrates put in the car.

Testimony of J. C. Smith, for Plaintiff.

J. C. SMITH, a witness, called and sworn on behalf of plaintiff, testified as follows:

I reside at Lovelock, Nevada. In November,

(Testimony of J. C. Smith.)

1918, I was employed by Mr. Loring and Mr. Friedman, the Pacific Tungsten, and by the Nevada Humboldt County Tungsten. At that time I was in Toulon. I was at the mill of the plaintiff corporation at all times. I had to do with giving Mr. Shewan samples of the concentrates [61] involved in this action. I don't just remember the date when those samples were given; it was several days previous to the shipment. I just quartered the samples at the mill. By "quartering" I mean quartering a sample down to a sample size. We take samples of a lot, we would have perhaps fifty pounds, and we would quarter that down to perhaps a four-ounce size, to get an average sample. It is part of the preparation. I personally handed the samples to Mr. Shewan. This was several days prior to the shipment. I handed him separate samples of the two lots, lot 1 and lot 2. Other samples were given to Mr. Shewan later on, on the day of the shipment, by Mr. Savage. Those were samples of both lots involved in this case, lot 1 and lot 2, and were separate samples. Mr. Shewan came up with his men that morning and started loading the car which was partly loaded with other concentrates; and I checked weights part of the time with Mr. Shewan at the scales, and Mr. Shewan's men carried them off and put them in the car. There had been prior to this time tags on these two lots. They were sacked prior to this time and the tags on these two lots were "L–1" and "L–2."

Mr. ANDREWS.—I don't want to take up your

(Testimony of J. C. Smith.)

Honor's time unnecessarily; as far as the question involved about lots 1 and 2 having been put in this car and this tungsten having been turned over, there is no question about that; in other words, there is no question about the fact that 11,000 pounds [62] of tungsten were put in this car referred to, and that it went east. There is no use taking the time of the Court to prove that.

Mr. LAMONT.—And Mr. Shewan, himself, took delivery at our mill?

Mr. ANDREWS.—I don't know what he did, but I concede that they went in that car.

Cross-examination.

The WITNESS.—I stated something about having made two sets of samples. The first set was made several days before the shipment. I don't just recall the day because I didn't pay much attention to it. I made that sample at Mr. Shewan's request. I could not say it was around the 21st of November; perhaps it was six or seven or eight days later. Mr. Savage made the second set of samples himself in my presence and in the presence of Mr. Shewan. [63]

The COURT.—Q. He asks you if you saw those delivered to Mr. Shewan? A. Yes, sir.

The WITNESS.—(Continuing.) Mr. Savage gave him these samples on the day of the shipment. I did not send any one of those sets of samples to the Atolia Mining Company.

Mr. LAMONT.—That is our case in chief, if your Honor please.

(Testimony of W. H. Shewan.)

Mr. ANDREWS.—If your Honor please, I would like at this time to make a motion for a nonsuit upon the ground that the telegrams introduced in evidence do not show any basis for contending that the defendant, Atolia Mining Company, was a principal, and that Shewan was its agent in the transaction involved herein.

The COURT.—It is really upon the ground of lack of evidence as to the agency of the purchaser, is it?

Mr. ANDREWS.—Yes, your Honor.

The COURT.—I regard it as quite sufficient for a *prima facie* case.

Mr. ANDREWS.—I note an exception.

DEFENDANT'S EXCEPTION No. 6.

Testimony of W. H. Shewan, for Defendant.

W. H. SHEWAN, a witness called and sworn on behalf of defendant, testified as follows:

I am engaged in the business of mine operating at the present time, up in Oregon, and I am not connected with the Atolia Mining Company at the present time. I was connected with the Atolia Mining Company in 1917 as lessee of the St. Anthony mine in Nevada; I had a lease on November 15, 1917. The St. Anthony mine is not the main property of the Atolia Mining Company; it is one of their side properties and is a small property; the main property is down in Randsburg, California, in San Bernardino County. [64]

(Testimony of W. H. Shewan.)

Mr. ANDREWS.—I will show you this agreement, Mr. Lamont.

Mr. LAMONT.—What is the material part of this agreement? I have not had time to read it over.

Mr. ANDREWS.—The pertinency of it is to show that the relationship between Mr. Shewan and the Atolia Mining Company is lessor and lessee.

The COURT.—That is absolutely immaterial; and the contents of the agreement is absolutely immaterial. A man may be a lessee of another or a lessor of another and still be his agent in a different transaction.

Mr. ANDREWS.—The only purpose of this is to show Mr. Shewan's relationship, outside of any special relationship which may have arisen out of these telegrams which were put in evidence, was not that of agent of the Atolia Mining Company.

The COURT.—You are not concerned in refuting his agency in any other transaction but this one. We are wholly uninterested in this transaction of the lease.

Mr. ANDREWS.—They introduced a check here sent by the Atolia Mining Company to Mr. Shewan. This lease provides for that matter in one of its paragraphs, and explains the circumstances under which those moneys were being sent to Mr. Shewan.

The COURT.—If you can show me anything that that lease has to do with this case, that is a different matter.

(Testimony of W. H. Shewan.)

Mr. ANDREWS.—It explains the circumstances under which—

The COURT.—Does it state that the money for the purchase of this ore was to be advanced?

Mr. ANDREWS.—No, your Honor. It does this: Here are two telegrams, from Shewan to the Atolia Mining Company and back again. Read without knowledge of the surrounding circumstances they would indicate that the Atolia Mining Company was offering to [65] buy this ore; in view of the surrounding circumstances it will appear that Mr. Shewan was buying the ore for his own account, that the Atolia Mining Company were permitting him to put the ore in this car; that the books of account will show that in all of these special transactions he bought for his own account.

The COURT.—You have an erroneous idea of the proper way of proving such things. If this were a controversy over the relations of the parties under this lease, the lease would be a perfectly proper medium through which to prove what the relations were; but in a transaction between third parties, you have a right to ask this witness what the fact was as to this agency, how he purchased these concentrates, and all that, but the lease has nothing at all to do with it.

Mr. ANDREWS.—Your Honor will remember the case in California, the Bergthold case, and I think your Honor may have been on the bench at the time that case was decided, where it was held that in cases of this sort it was permissible to go

(Testimony of W. H. Shewan.)

into all of the circumstances surrounding the entire transaction.

The COURT.—That is an entirely different thing. I remember that case very well. You have a right to go into circumstances where you are not precluded by your writing.

Mr. ANDREWS.—I don't mean that this lease is to be introduced for the purpose of binding the plaintiff. I merely want to show the relations of the parties.

The COURT.—You can ask this witness what his relationship was. He has already said he was a lessee of the St. Anthony mine. We are interested in that, of course, because that identifies what his relationship was to that extent. We are not interested in this lease at all. [66]

The WITNESS.—(Continuing.) The lease was entered into on November 15, 1917. After the lease was entered into I had a conversation with Mr. Voorheis with reference to my purchasing special lots of tungsten concentrates. The conversation took place in the Humboldt Bank Building, room 1404. No one was present but Senator Voorheis and myself. It was around Christmas time, the end of the year 1917. After we had talked over the management of the St. Anthony mine, and my proposition of running it, Senator Voorheis said that if at any time I could buy any small quantities of ore, of tungsten concentrates, as he explained to me, in order to get a carload, which reduced the shipment rates a great deal, he claimed that the

(Testimony of W. H. Shewan.)

freight on a ton lot would be around about $90 for shipping East, and a carload would run, on an average, somewhere around about $50, he says that any time I could buy any small lots that way that were absolutely pure, free from impurities, and running over 60 per cent WO_3 that the company would advance me the money to pay for the same and give me anything that I made on the purchase.

The COURT.—Q. You say Mr. Voorheis authorized you to buy any small lots of concentrates for filling out carload lots?

A. Yes, your Honor.

The COURT.—Q. What were you to buy these concentrates for—for them to fill out carload lots for them?

A. With my own ore that I was putting in the car, I would not have enough for a carload, but he was shipping some for Mr. Loring, from Toulon, and in order to make a carload I could buy up these small lots. [67]

Mr. ANDREWS.—Q. Did Mr. Voorheis say anything about on whose account the ore was to be purchased, in those small special lots?

A. I was buying them on my own account.

Mr. LAMONT.—Just a moment; we object to that, and ask that it be stricken out.

The COURT.—Strike that out. Answer the question. Read the question to the witness.

(Question read by the reporter.)

A. He did.

Mr. ANDREWS.—Q. What did he say?

(Testimony of W. H. Shewan.)

A. He said they were to be purchased by me and the company would advance the money to pay for them.

The COURT.—Q. His company?

A. His company.

Mr. ANDREWS.—Q. Did he say anything about selling that ore?

A. I had a contract with him to sell all my ore, under the terms of my lease.

Mr. LAMONT.—We ask that that be stricken out as immaterial, irrelevant and incompetent, and referring to the contents of a written instrument.

Mr. ANDREWS.—That is the instrument that I wanted to put in evidence. I wanted to show that all of these transactions were all a part of the same idea, that the company was advancing money back and forth, he being without any capital.

The COURT.—Let that be stricken out. Answer the question now, Mr. Shewan. Just notice what the question is, and you will be able to answer it. Read the question.

(Question read by the reporter.)

A. He did.

Mr. ANDREWS.—Q. Please state what he said.

A. He stated that whatever I purchased that way I could sell through the company as my own; I could put it in the carload lot. [68]

Mr. LAMONT.—If your Honor please, I would like to urge some general objections at this time to these defenses.

The first objection is that counsel have pleaded

(Testimony of W. H. Shewan.)

four defenses, all of which are apparently affirmative defenses, based upon misrepresentation. They have been embodied in separate defenses, numbered 1, 2, 3, and 4, and are, in effect—at least the defenses are, in their nature, defenses in confession and avoidance. There is no concession whatsoever made of the existence of this contract. In order to direct the Court's attention more specifically to the situation, I want to refer to some of the language in the answer. I call your Honor's attention—

Mr. ANDREWS.—I think you have the wrong conception of this. I am simply trying to get from Mr. Shewan a statement of his conversation with Mr. Savage. That involves two things; Mr. Shewan, in his conversation with Mr. Savage, stated that he was not the agent of the Atolia Mining Company, and that he was buying on his own account, and notified Mr. Savage to that effect. That is the question I asked Mr. Savage on cross-examination, and he denied it. The other part of the conversation was the details as to the purchase price, and all the details that went into the contract which is the basis of their cause of action. The receipt which they have here merely sets forth that he received this.

The COURT.—State your objection, Mr. Lamont.

Mr. LAMONT.—Counsel is apparently at the present time attempting to advance evidence as to representations so far as these particular concentrates are concerned. I object upon the ground that

(Testimony of W. H. Shewan.)

no such defense has been pleaded in the present action. There are four separate defenses.

The COURT.—What is the defense?

Mr. LAMONT.—The defenses allege a contract between plaintiff [69] in this action and Mr. Shewan. The affirmative defenses allege no contract between the plaintiff and the defendant. Then they attempt to set up fraud, or misrepresentation, in a separate contract to which the defendant in the present action is not a party. In other words, all four separate defenses attempt to avoid, they deny that any contract existed between plaintiff and defendant in the present action.

The COURT.—Then how are you interested in any fraud or misrepresentation?

Mr. ANDREWS: In this way: In the first part of the answer, we have taken the position that this gentleman was never our agent. It is claimed that Mr. Shewan was our agent. We have a right to plead inconsistent defenses. While we deny that he was our agent, and refuse to admit that such was the case, nevertheless, plaintiff so claims, and if the Court should find that he was our agent and the contract is binding on us—

The COURT.—That is rather a singular pleading; I doubt whether it is a good pleading.

Mr. ANDREWS.—I do not see, your Honor, how we could very well do anything else. If your Honor feels that, under the facts, he was our agent, then we have been damaged by misrepresentation.

The COURT.—You could not be damaged if he

(Testimony of W. H. Shewan.)

was not your agent. You have to stand on one thing or the other. You can, of course, put in inconsistent defenses.

Mr. ANDREWS.—That is what we are doing.

The COURT.—Well, there is no jury here. I will see what the evidence leads to.

Mr. LAMONT.—I urge the further objection in regard to the affirmative defense that—

The COURT.—Let me advise you that you must put in all your [70] objections at once; the Court cannot permit you to do it piecemeal.

Mr. LAMONT.—I can raise the same point in another way; to another question I can make an objection which will raise the same points.

The COURT.—You may state them, if you wish, but I do not want you to understand we try cases that way. If you have any objection to a question, you must make all your objections at the one time; you cannot submit one and have it overruled, and then attempt to interpose others.

Mr. LAMONT.—The other objections I will state to the Court so that your Honor will understand the ground of them and then I can urge them later on in regard to some other question.

The COURT.—I will let you interpose them here, but, of course, you will readily appreciate that that course violates the proper method of putting in evidence.

Mr. LAMONT.—In regard to the first and third defenses, counsel have apparently attempted to set up a rescission. They allege a tender back to the

(Testimony of W. H. Shewan.)

plaintiff of the sheelite concentrates in question, but that tender is made conditional upon us paying the freight, which they apparently incurred in sending the concentrates from Lovelock to Niagara Falls, which is a conditional rescission, and none other.

As to the second and fourth special defenses, they are apparently based upon damage, and are not pleaded in the way of a counterclaim at all. Those are the different objections to the defenses.

The COURT.—I will see what this leads to. I doubt whether that is a good defensive pleading. Proceed." [71]

The WITNESS.—(Continuing.) I had a conversation with Mr. Savage relative to the purchase of this tungsten ore, around about the 20th of September I should say. On examining Plaintiff's Exhibit No. 1 it refreshes my memory and I would say the conversation took place about November 20, 1918, at the St. Anthony mine, Churchill County, Nevada. I think there was someone with Mr. Savage in his car, but I am not sure; my son and and myself were there with Mr. Savage. Mr. Savage asked me if I was buying any scheelite concentrates and I said I was. He said he had about six tons down at his place, and I said, "What do you want for them?" He said, "I don't know; what will you give me?" I said, "I don't know; I can't say offhand; but around about $21.50." We stood there and talked for a little while. Mr. Savage said he thought he would take that. After a short conversation, he

(Testimony of W. H. Shewan.)

drove away. I offered him $21.50 per unit.

Mr. ANDREWS.—Q. What was said, if anything, relative to the content of the tungsten that Mr. Savage was offering you?

A. That it must be over 60 per cent WO_3 and absolutely pure from all impurities, phosphorus and copper especially. Of phosphorus, .05 was *a* high as they could go. Mr. Savage said that the ore was absolutely pure, some of the best tungsten that he had ever shipped. I believe that Mr. Savage said he had an assay of the ore, an analysis of it. That was all that was said in that conversation. On the following morning I had a further conversation with Mr. Savage relative to this matter. That was November 21st. The conversation was over the telephone. I was at the St. Anthony Mine's office, at Fanning, Nevada; I believe Mr. Savage was at the Tungsten Mill, Humboldt County. He said that he would have to cancel the sale of that tungsten, that he thought he could do better. I said, "All right, Mr. Savage, that is up to you; if you can do better, all right, no harm done." That is all that was said in [72] that conversation. That afternoon again Mr. Savage called me up on the telephone, at about five o'clock, and he stated that he had reconsidered that, and he asked me if I would be able to take any more than the six tons. I said I thought I could handle it. He said he thought he would have around about twelve tons. He said, "If your offer still stands open, I will do business with you." I said, "All right, I will take it providing it is under the same

(Testimony of W. H. Shewan.)

rule as the other, absolutely free from impurities," and he said it was. I sent the telegram I have here in my hand in the evening shortly after I had the conversation with Mr. Savage. That was after I had agreed with Mr. Savage that I would buy these twelve tons of concentrates. The reason I sent that telegram to the Atolia Mining Company after I had already agreed to buy the tungsten concentrates from Mr. Savage was that I didn't want the company to make any arrangements to take any more ore that would overload the car, and I wanted to have room to put in the twelve tons. I knew that the Atolia Mining Company was filling up the car with some ore of the Pacific Tungsten Company. I was loading the car for them with my men. The Humboldt Tungsten Company's ore and Mr. Loring's ore and my own was going into the car. Prior to my having arranged with the Humboldt people to take their ore I knew that Mr. Loring's and my own ore was going into the car. By Mr. Loring's I mean the Pacific Tungsten Company's ore.

After the conversation of which I have just spoken I had further conversation with Mr. Savage every day, and I think the car was finished somewhere around the 28th or 29th. I remember signing this receipt which has been introduced in evidence here as Plaintiff's Exhibit No. 6. This document was drawn up in the [73] Humboldt Tungsten Company's office at Toulon, Nevada, I presume, by Mr. Savage. I think he wrote it on the typewriter, if I am not mistaken, or his clerk did. When I

(Testimony of W. H. Shewan.)

came to sign it, I seen that it was made in the name of the Atolia Mining Company; I said, "Mr. Savage, I have no right to sign anything connected with the Atolia Mining Company, as I am absolutely dealing on my own account with you, and I am not permitted to sign anything for the Atolia Mining Company." Mr. Savage said, "Mr. Shewan, we have nothing to show at all where our concentrates went to, it is merely a protection, I know that everything is all right, but it is a protection in case anything happens to you for us to trace the ore." Then I signed the document.

At the time I signed this document I signed another document.

The COURT.—Q. Why didn't you say to him that his purpose would be fully subserved by simply stating in there, "to be shipped with the concerntrates belonging to yourself and other parties there." That would have identified where their ore was to go, wouldn't it?

A. It should have done so, yes.

WITNESS.—(Continuing.) I signed the original of the document which you show me at the same time that I signed Plaintiff's Exhibit No. 6, and I delivered the original of it to Mr. Savage.

The COURT.—(After examining the document.) I will let it go in merely for the purpose of affecting the question of the accuracy of the witness' memory.

The following document was then offered and admitted in evidence and marked "Defendant's Exhibit 'A.'"

(Testimony of W. H. Shewan.)

Defendant's Exhibit "A."

"Lovelock, Nevada, Nov. 29, 1918.

"Received from the Humboldt County Tungsten Mines and Mills Co. seventy-two sacks, containing eleven thousand and nine pounds Net (11,009 Lbs.) scheelite concentrates belonging to the Tungsten [74] Dyke Mining Co. and others. I hereby guarantee all milling charges as per attached statements amounting to $2,567.70, same to be paid from first payment on above concentrates.

(Copy.) W. H. SHEWAN."

The WITNESS.—(Continuing.) I heard Mr. Savage this morning testify that he had had a conversation with me at his house at Toulon and that it was at that time that I negotiated for the purchase of the tungsten. My recollection in that regard is that I had a conversation with Mr. Savage after the tungsten had been sold. It was some time afterwards and he had made inquiry about the payment of it and I called at his place to tell him about it, to tell him that I had written to San Francisco about it; Mr. Savage was in bed. It was after these wires were sent out.

I wrote a letter dated November 22, 1918, which is the date of those telegrams and it is my signature, and sent it to Mr. Voorheis.

Counsel then offered in evidence a letter dated November 22, 1918, addressed to E. C. Voorheis, 1404 Humboldt Bank Bldg., San Francisco, and signed by W. H. Shewan, which was introduced in

evidence, marked "Defendant's Exhibit 'B,'" and which reads as follows:

Defendant's Exhibit "B."

"Toy, Via Lovelock, Nevada, Nov. 22d, 1918.

E. C. Voorheis,

#1404 Humboldt Bank Bldg.

San Francisco, Cal.

Dear Mr. Voorheis:

Yours of Nove 20th rec'd in which you state Mr. Loring has 24 or 25 tons ready for shipment, I have already made arrangements with the S. P. Co. for tomorrows Local to spot a car at Toulon on its way East, on Tuesday the local will bring the [75] car here I will complete loading and it will go out on an Eastern Train Tuesday night.

Regarding the 12 tons I wired you about I had made arrangements with Mr. Savage to take it at $21.50 per unit, later he called me up and said he could get $23.00 for it so I told him if he could get that he had better take it, my first agreement with Mr. Savage was for 6 tons, and he afterwards rang up and said he could make up 12 tons with some small lots he had on hand and I found out that the small lots was Mr. Beans who is associated with Mr. Beck.

Mr. Bean called me up by phone from Lovelock yesterday and asked if I had made arrangements with Mr. Savage to take that 5 tons, and I told him Savage said he could get a better price and I told him he had better take it, at any rate Mr. Bean

will call in person Monday to see you and if you have made any agreement with Mr. Beck you can let him know.

I note what you say regarding the Tungsten market, and I am very sorry to hear it as the mine is sure looking better than it ever did, I have just completed driving a tunnel on Tip Top #2, to cut the vein which gives me a stoping backs of about 80 ft., and yesterday we broke into the ore instead of gouging the mine as Mr. Hersey said in his report, I have sure developed as big a low grade Mine as there is in Nevada, and one that will stand the most rigid examination, I do not like to criticize as prominent a Geologist as he is but I must say that his practical education as a mining man has been sadly neglected, he speaks in his report of a marble stone in the contact this I have never found in the St. Anthony Mines yet, there is in the hanging wall 3 grades of a lime stone a white lime also black lime and a silicified lime shale stone and the foot wall is composed of blue and decomposed granite. [76]

The ore bodies very often fault and raise in the hanging or drop in the foot, that is where they lost the ore in driving west, however, I cannot understand why Mr. Hersey would have some one with him to show him the ore bodies as a man making a report on a mine, should be able to tell ore from waste.

I want to thank you for sending me Mr. Friedman's statement at the United States Senate he sure must have been quite a Joke before the com-

(Testimony of W. H. Shewan.)

mittee of Mines, and I think he would do much better back at his old original business selling Singer Sewing Machines thru the Humboldt Valley, I was told yesterday that there mill that was constructed by Freitag and Company, was giving them considerable trouble, but I guess that is to be looked for starting a new mill.

I will wire as soon as I make the shipment and will try and not omit anything this time on the shipping bill.

With kindest regards,

Yours very truly,

W. H. SHEWAN."

The WITNESS.—(Continuing.) I received from Senator Voorheis a letter dated November 20, 1918, which is the letter referred to in my previous letter ("Defendant's Exhibit 'B,' "), which is the following letter:

Defendant then offered the following letter, which was admitted in evidence and marked "Defendant's Exhibit 'C.' "

Defendant's Exhibit "C."

"San Francisco, Cal., U. S. A., Nov. 20, 1918.

Mr. W. H. Shewan,

Toyland, Nevada.

My dear Shewan:

I have your letter of the 16th and note what you say. I was just talking with Mr. Loring's office and he thought they had 24 or 25 tons of ore ready to ship and if that is the case I wish you would take

what you have, about 6 tons, up to the Toulon Mill so as to make a shipment of 30 tons, or such a matter whatever they have to go with your 6 tons. Mr. Loring is up there now and you may see him at Lovelock or at the Mill. [77]

I also note what you say in regard to the prospect that Mr. Clark had and it is just about as I expected it would turn out, no good.

You spoke of Mr. Savage having some for sale, see what you can buy it for and get a sample of it and if you can make anything on it, it is up to you. If you can get it cheap enough it could go in this car we are shipping but it would have to be tagged so as to keep the different lots separate.

The big car which was all of Loring's ore arrived to-day at Cleveland, so we will get returns inside of a couple of weeks.

I just received a wire from Loring stating that they have on hand nearly 18 tons and sufficient ore in the mill to produce 25 tons altogether which will wind up their milling at Toulon, so you will have a day or two to get your lot up there ready to ship. I sent you tags some time ago to attach to your lot. Loring's lot will not need any tags. Perhaps you can arrange when the ore is ready to ship to have the empty car drop off at your siding and you can load yours and then the car can be hauled to the Toulon Mill and finish loading.

Yours truly,

E. C. VOORHEIS.

ECV/M.

Will send you shipping papers to-morrow."

(Testimony of W. H. Shewan.)

The WITNESS.—(Continuing.) I received a letter dated February 13, 1919, addressed to myself and signed by Mr. Voorheis.

The counsel thereupon offered the letter which was introduced in evidence, marked "Defendant's Exhibit 'D,' " and reads as follows:

Defendant's Exhibit "D."

"San Francisco, Cal., U. S. A., Feb. 13, 1919.

Mr. W. H. Shewan,

Toy, Via Lovelock, Nevada.

My dear Shewan: [78]

We have been making up your account and enclose a copy to you which you will kindly check up and let us know if it is correct. We have given you credit for all the special lots which have been purchased at a profit and have given you the benefit of the purchases. The statement shows that you owe us $2,740.38, that is you did not get out enough by that amount to pay the expenses, except less the value of the ore you sent to Mill City, which is now *en route* East but we cannot settle with that until we know what we are going to get for it. By the way, did you send a sample of that to Atolia so we can make an estimate of it? If not, and if you have a sample, please send it to Atolia.

The tungsten situation is in bad shape. We had a wire yesterday from New York stating that there were 6,000 tons of ore there from foreign countries, stored in New York which can probably be bought for ten dollars a unit, or even less. There have been

(Testimony of W. H. Shewan.)

some buyers down in the Atolia field buying surface ore which is picked up on the desert and they have offered five dollars a unit.

We have closed down tight at Atolia and do not know when we will be able to start up.

After looking over the statement *kindly me* know if you find the same correct.

Yours truly,

E. C. VOORHEIS.

ECV/M. ENC."

The WITNESS.—(Continuing.) I received a letter dated February 17, 1919, addressed to myself signed by Mr. Voorheis.

Counsel offered said letter in evidence and it was introduced in evidence and marked "Defendant's Exhibit 'E,' " and reads as follows:

Defendant's Exhibit "E."

"San Francisco, Cal., U. S. A., Feb. 17, 1919. [79]

Mr. W. H. Shewan.

Toy, Via Lovelock, Nevada.

SHIPMENT LOT SA–13.

My dear Shewan:

We just received telegraphic advice from the East in regard to Lot shipped from Mill City for Niagara Falls which contained the following lots:

	Lot.	Bags.	Gross.	Tare.	Net.
Loring's	#7	535	61106 lbs.	588 lbs.	60518 lbs.
Humboldt C. T.	#8	104	12035 "	124 "	11811 "
Beck & Bean	#9	82	11118 "	90 "	11028 "
Shewan's	#SA13	140	14179 "	154 "	14025 "
Total,		861	98438 "	956 "	97482 "

These two lots that you bought from Humboldt County Tungsten and from Beck & Bean ran so high in phosphorus it raised hell with the whole carload. The only two lots that are up to specifications are your Lot SA–13 and Loring's Lot #7. The other two will have to be thrown out and left at Niagara Falls until we can make proper disposal of them. I presume that you had understood with the Humboldt County Tungsten people that this ore was to be free *free* from phosphorus and the limit allowed us on phosphorus is .05%. That is the reason I wired you to-day to hold up the check we sent you to settle with Humboldt County Tungsten and I trust you have not given them the check. We will do the best we can for them but do not care to pay them for something that was misrepresented. Kindly advise us on receipt of this whether or not you have settled.

Yours truly,

E. C. VOORHEIS.

ECV/M.

ANALYSIS BY PITTSBURGH TESTING LABORATORY. [80]

	No. 7	No. 8	No. 9	No. SA13
MOISTURE	.049%	.066%	.04%	.10%
After Drying:				
TUNGSTIC ACID	68.45%	61.87%	63.60%	61.95%
PHOSPHORUS	.057%	.146%	.254%	.200%
SULPHUR	.046%	.397%	Trace	.152%"

The WITNESS.—(Continuing.) I remember sending a letter to Mr. Voorheis dated February 20,

(Testimony of W. H. Shewan.)

1919, which was signed by myself.

Counsel offered said letter in evidence and it was introduced in evidence and marked "Defendants' Exhibit 'F,'" and reads as follows:

Defendant's Exhibit "F."

Fanning, Feb. 20th, 1919.

Mr. E. C. Voorheis,

#1404 Humboldt Bank Building,

San Francisco, Calif.

Dear Mr. Voorheis:

Yours of Feb. 17th received last night, also confirmation of wire to hole up payment on H. T. M & M. Company.

I note what you say regarding these two lots of Ore, they were both represented to me as being free from all impurities, and as Mr. Savage told me he had had an analysis of the ore, I thought we could depend on his word, as he certainly had handled enough Tungsten Ore to know what grade would be accepted.

I am returning check and statement of the Humboldt Tungsten Company, to you as advised by Mr. Morrish, and I can assure you that I am very sorry this has happened on account of my handling the affair.

With kindest regards, I am,"

Mr. ANDREWS.—Q. I show you a letter dated March 31, 1919, signed by Mr. Voorheis, and ask you if you received that letter. A. I did.

(Testimony of W. H. Shewan.)

Mr. ANDREWS.—I offer this letter in evidence.

Mr. LAMONT.—I object to it on the ground that the letter was written long after the controversy here involved was started.

The COURT.—The objection will be sustained to this letter. It is purely self-serving. [81]

Mr. ANDREWS.—The purpose of this is to show the relations between the parties.

The COURT.—That is disclosed.

Mr. ANDREWS.—May I offer this for identification, and may I have an exception to the ruling excluding it?

The COURT.—Yes.

(The letter excluded reads as follows:)

"San Francisco, March 31, 1919.

Mr. W. H. Shewan,
Lovelock, Nevada.

My dear Shewan:

I enclose herewith a letter and memorandum which we received from Mr. Savage in regard to his lot of ore which you agreed to take from him and which was included in the shipment over which we are having so much trouble, also a carbon copy of letter sent to Mr. Savage.

This matter is between you and Mr. Savage, as you were purchasing this ore for your own account and were to get the profit. The Atolia Mining Company was not interested in it at all and you had no authority to act for the Company in this matter, as we told you if you could purchase any outside ore

(Testimony of W. H. Shewan.)

and make a profit on it well and good, it would be for your account.

You can see Mr. Savage and explain this matter to him.

Very truly yours,

E. C. VOORHEIS."

DEFENDANT'S EXCEPTION No. 8.

Mr. ANDREWS.—I have here a letter, Mr. Shewan, dated May 10, 1919, written by you to Mr. Stent. Did you write that letter?

A. Yes. At that time I think Mr. Stent was the secretary of the Atolia Mining Co. [82]

Mr. ANDREWS.—I offer this letter in evidence.

Mr. LAMONT.—I object to it on the ground that it was written long subsequently to the happening of the matters involved in this case, and is immaterial, irrelevant and incompetent.

The COURT.—(After inspecting the letter.) The latter part of this has nothing to do with the case.

Mr. ANDREWS.—No, your Honor.

The COURT.—The objection is sustained.

Mr. ANDREWS.—I make the same offer for identification, and not an exception to the ruling.

The COURT.—Yes.

(The letter offered in evidence and rejected, read as follows:)

"ST. ANTHONY MINES LEASING COMPANY,

W. H. Shewan, General Manager.

Fanning, via Lovelock, Nevada, May 10th, 1919.

E. A. Stent,

#1404 Humboldt Bank Bldg.,

San Francisco, California.

Dear Mr. Stent:—

Yours of May 7th just rec'd and contents duly noted, and am enclosing you the two copy's of the agreement to the Humboldt County tungsten Mining and Mills Co. signed by me at the time of my purchasing the concentrates. These agreements were given by me at there request in case of anything happening to me between the time of purchase and the time of final settlement.

This was done in order to show who I was selling to and as I stated a protection to said company.

I am also having a copy of Lease sent under separate cover as per your request. [83]

I am very sorry that this trouble should arise and especially over concentrates purchased by me, but as I have stated several times before in my letters to your company, that Mr. Savage, gave his absolute guarantee that the concentrates was free from all impurities.

(Remainder refers to matters foreign to case.)

With very best wishes,

Yours very truly,

W. H. SHEWAN."

(Testimony of W. H. Shewan.)

DEFENDANT'S EXCEPTION No. 9.

The WITNESS.—(Continuing.) I never offered $23.50 per unit for the tungsten involved in this case, as Mr. Savage testified this morning.

Cross-examination.

The WITNESS.—I testified that I purchased these concentrates in order to complete a car and purchased them on my own account. The reason I was careful to give the amount purchased in my telegram of November 21st to Mr. Voorheis was to reserve space in the car for the ore. The price was given in that telegram so that they would book it and credit me with anything over what they sold it for.

I recognize the answer to the telegram which I have in my hand. When I got that answer I still thought I was buying it on my own account. The reason Mr. Voorheis said in his answer "must be free from impurities, would prefer to have sample analyzed first" was because he did not want any impure ore shipped in the carload he was shipping. It would make a great deal of difference if the ore was to be kept separate. He didn't want to make any impure purchases, and he didn't want to ship it to his people in the east. [84]

The lot purchased from Beck & Bean was partly bought through me and the company in San Francisco. It was divided in two lots and paid for in two lots, Beck & Bean and DeArmond. The entire lot went through my hands. I paid for all of it. I think the Atolia made out the statement to Beck

(Testimony of W. H. Shewan.)

& Bean, but I settled in Lovelock for it. No, some of the Beck & Bean lot was not purchased on the same basis as the lot involved in the present suit. Mr. Beck had been in the office in San Francisco and it was partly made through San Francisco and partly made through me up there. All of the Beck & Bean lot was offered to me for sale. You might say I was the purchaser because I settled for it. There is a distinction between the lot involved in this suit and the Beck & Bean lot as far as the purchaser was concerned. Mr. Beck had been at the Atolia office and I did not figure I was connected with it at that time, but they sent me a check and had me settle with those men at Lovelock, as there was a dispute between Beck & Bean and De Armond.

The Beck & Bean lot proper was not dealt with on the same basis as the tungstic acid involved in the present suit. The distinction was that the other that was bought of the Humboldt Tungsten Mines and Mills Company I purchased myself right from Mr. Savage.

Yes, I was wrong in saying a while back that the Beck & Bean lot, part of it, was upon the same basis as the purchase in the present suit. There were no other ores purchased at that time upon the same basis as the ore in the present suit. I think the ore in the present suit stood by itself, not at that time though, but previous to that. You might say all the other ore that went into this car stood on the same basis as this particular ore [85]

(Testimony of W. H. Shewan.)

bought from the Humboldt Tungsten Mines and Mills Company; mine stood on that basis and mine was in that car. The purchase of the other ores was just the same as mine. I sold mine to the Atolia Mining Company.

I do not remember a conversation on or about March 20, 1919, between myself and Mr. Savage in which he said to me, in words, or to the effect: "I understand the company has taken the position now that you are not their agent," nor that I replied to him, "Who else could I have been acting for?" Such a conversation never occurred.

The lot that is furnishing the subject matter of this suit went along in the same car with the other lots that were purchased by the Atolia Mining Company and were billed to the Atolia Mining Company under the same bill of lading. I was not making profits on all these different ores. I was making a profit on what I bought from Mr. Savage and not on any others in that shipment. My profit was the difference between the price paid Mr. Savage and the regular market, which was $25 a unit at that time.

The check you show me marked "Plaintiff's Exhibit 4" was for Mr. Savage. That was just the amount due him. Yes, it came from the Atolia Mining Company as payment for Mr. Savage; it came to me.

I did not take samples of this ore prior to the date of sale. I did not take samples about four or five days or six or seven days prior to November

(Testimony of W. H. Shewan.)

29th. I took no samples prior to the 29th; I did during the time that we loaded the car. I sent those samples to the Atolia Mining Company at Atolia to be analyzed.

After sending those samples to the Atolia Mining Company I cannot remember the date of the next communication, from the Atolia Mining Company, but there was a communication that the samples had reached Atolia in very bad shape, some of them. [86] I know Mr. Pierson, of Lovelock, Nevada. No conversation ever occurred about the time these concentrates were shipped, in which I stated to Mr. Pierson that I was acting for the Atolia Mining Company. I had had many conversations with Mr. Pierson during that time, at the Mercantile Bank at Lovelock. I don't know that anybody else was present. At none of those conversations, did I ever state to Mr. Pierson that I was buying these concentrates and shipping this car for the Atolia Mining Company.

I did not have a conversation in the office of Mr. Savage at Lovelock a day or two after these concentrates had been shipped, in which Mr. Savage asked me whether I had communicated with the Atolia Mining Company to keep lots 1 and 2 separate. I don't remember that I had any conversation with Mr. Savage in his office shortly after these shipments had been made. There might have been a conversation after the time was up for payment on it, though I would not say definitely that no conversation occurred between myself and Mr. Savage in

(Testimony of W. H. Shewan.)

his office from the time these goods were shipped until the time of payment; I may have; I often stopped there in passing his place; if so, I do not remember anyone being present. I do not remember taking down the telephone during any one of those conversations and dictating a wire to the Atolia Mining Company. I would not say I did not. I would say that I did wire to the Atolia Mining Company not to mix the samples of lot 1 and lot 2.

Redirect Examination.

The WITNESS.—At the time that this conversation took place about mixing the samples I think the car was en route east. I remember having a conversation with Mr. Savage after this tungsten was shipped at Lovelock, Nevada, with reference to this particular transaction. I know it was after the car was shipped. It was at Lovelock, Nevada; just Mr. Savage and myself were present. I was coming out of the postoffice in Lovelock, Nevada, and Mr. Savage drove up in his car. I had heard at that time that he [87] had entered a suit against the Atolia Mining Company. I met him, and I said, "Mr. Savage, I see you entered a suit against the Atolia Mining Company." He said, "Yes." I said, "Don't you think you are suing the wrong person?" He said, "No, I don't think so; I am suing the men that got the concentrates and the men with the money." I said, "All right, go ahead."

Testimony of E. C. Voorheis, for Defendant (Recalled).

E. C. VOORHEIS, a witness previously sworn, was then called as a witness on behalf of the defendant, and testified as follows:

I was present of the Atolia Mining Company in 1917 and have been president of it ever since.

I had a conversation with Mr. Shewan some time in December, 1917, in my office relative to the purchase by Mr. Shewan of special lots of tungsten concentrates. This was somewhere about the holidays. Mr. Shewan was down from Nevada. He was not producing much ore under his lease and he suggested that he might be able to purchase outside ore and help fill up a carload, and that would get his ore to the market quicker than to hold it until he could accumulate a carload on his own lease. I told him he certainly could purchase such ores as he found would comply with our contracts, our Eastern contracts. We had at that time a contract for the delivery of 300 tons; the specifications in the contract were that the ore should contain not exceeding .05 phosphorus, must be 60% WO_3, or tungstic acid, or better, and not more than one per cent sulphur, no copper. We had shipped the ore under this contract as we could get it, both from Atolia and from the St. Anthony mine. At that time I told Mr. Shewan he would have to be very careful in purchasing ore without a formal analysis; he must be sure that the ore was absolutely pure and not containing any detrimental elements that

(Testimony of E. C. Voorheis.)

would be rejected by the people whom we had contracted with. [88] That if he should buy any small lots of ore and could get them for a less figure than what we sold for under our contract, he should have the profit.

When we have contracts like that we aim to ship carload lots always; we never ship anything less than carload lots, from 30 to 40 tons; and when a car is shipped, we have a preliminary analysis; the cars are all billed to ourselves, to the Atolia Mining Company, at Niagara Falls, at Pittsburgh, or at any other place where the ore is sent. When the bill of lading is sent to us, we endorse the bill of lading, attach a sight draft for 90 per cent of our estimated value, that sight draft is cashed at the bank, and then we give Mr. Shewan the amount of money to pay for the ore which he had purchased.

The standard was that it should not contain more than .05 phosphorus, not over 1 per cent sulphur, and no copper, and should run 60 per cent or better WO_3 or tungstic acid.

Mr. ANDREWS.—Q. Why did you insist on Mr. Shewan having this ore come up to standard?

The COURT.—Because that is the character of the ore that he contracted for in the East?

The WITNESS.—(Continuing.) Yes, and if he got anything in the car that did not come up to the standard, as in this case, this whole car was rejected.

Thereupon counsel offered the following letter, also the document attached as part of said letter, in evidence, which were admitted, both marked "Defendant's Exhibit 'G,' " and read as follows:

Defendant's Exhibit "G."

"Chicago, March 22nd, 1919.

Atolia Mining Co.,
1404 Humboldt Bank Bldg.,
San Francisco, Cal.

Gentlemen: [89]

Your letter of March 11th, in reply to my wire of the 10th, just received.

We note our Lots L–1, and L–2, has been designated in your billing as special Lot No. 8, therefore, being mixed and sampled as one lot, which was absolutely contrary to our understanding with Mr. Shewan, as we furnished him separate control samples on lots one and two, and each lot being plainly designated as L–1 and L–2 also receipt which he signed plainly defines each lot, and as a further precaution requested Mr. Shewan to wire your Company that Lots L–1 and L–2 should not be mixed, as we know Lot L–2, carried impurities, but not having a complete analysis of this lot, the extent of impurities was not known.

We are also exceedingly sorry that we included any of our concentrates in your shipment, as we could have found ready market for same at that time, and could have prepared shipment in such manner as to have eliminated any chances of contaminating high grade lots with those carrying impurities.

You can readily see that we have been materially damaged by the mixing of these two lots, and in view of the fact that we took every available pre-

caution to have these two lots treated separately, but nevertheless the error was made, and through no fault of ours, therefore, we shall expect settlement on these lots as per our agreement with Mr. Shewan, and enclosed statement.

Hoping we may be able to arrive at an amicable settlement of the above difficulties,

Yours very truly,

HUMBOLDT COUNTY TUNGSTEN M. & M. CO.

By L. A. SAVAGE,

Res. Mgr.

Counsel for the plaintiff admitted the foregoing letter was signed by L. A. Savage. [90]

"ATOLIA MINING COMPANY,

to

HUMBOLDT COUNTY TUNGSTEN M. & M. CO., DR.

MEMORANDUM OF CONCENTRATES SOLD ATOLIA MINING CO., November 29th, 1918.

Lot L–1	Sacks	Gr. Wt.	Net Wt.	Assay	Phos.
	72	8809#	8723#	66.60	.037
8723 x 66.60 WO_3=5809.518# WO_3					
580.518# = 290.4759 Units					
290.4759 Units @ $21.00 per unit=					$6100.00
Lot L–2	Sacks	Gr. Wt.	Net Wt.	Assay	Phos.
	32	3204#	3170#	61.60	Undetermined.
3170# x 61.60 WO_3=1952.72# WO_3					
1952.72# WO_3 = 97.636 Units					
97,636 Units @ $21.00 per Unit=					$2050.35
				Total,	$8150.35."

Counsel thereupon offered in evidence certificate of analysis of H. R. Mosley, chemist for the Atolia Mining Company and signed by said Mosley, which document was offered in evidence and reads as follows and marked "Defendant's Exhibit 'H.' "

(Testimony of E. C. Voorheis.)

Defendant's Exhibit "H."

"CHEMICAL RESEARCH LABORATORY.
Atolia Mining Company.
CERTIFICATE OF ANALYSIS.
Atolia P. O., San Bernardino Co., Cal.,
December 9, 1918.

Laboratory No. 2094, Submitted to us for analysis contains:

2095

Sample of Sheelite Concentrates.
From Humboldt County Tungsten Co.

	%WO_3	%S.	%P.
Lot No. 1	69.50	.381	.045
Lot No. 2	62.00	1.140	.157

To ————

H. R. MOSLEY,
Chemist." [91]

The COURT.—Q. With reference to the departure of the car for the east, when were these control samples sent to you—before the car had left? A. No, the car was on the way.

Q. I gathered that there were samples delivered, according to the testimony of the witness Smith, several days before the shipment, and then there were samples also delivered on the day of the shipment.

Mr. ANDREWS.—Yes, your Honor, Mr. Smith testified he made two separate sets of samples, one some days prior to the 29th.

(Testimony of E. C. Voorheis.)

The COURT.—Yes, and he gave them to Shewan.

Mr. ANDREWS.—And Mr. Shewan denied that.

The COURT.—I didn't hear him deny it.

Mr. ANDREWS.—Yes. I asked him that question particularly, and he said the only samples he got were those on the 29th.

The COURT (to Mr. Voorheis).—Q. Would you permit Shewan to make purchases of ores to go to your correspondents in the east which were at variance with your requirements, and not require samples preliminary to their being shipped?

A. We could not get the samples until they were shipped; the samples were taken that day.

Q. The testimony here shows that samples were delivered before that day. Would you permit Shewan to put into your car anything that had not been demonstrated to you as being within the calls of your contract? A. No, not if we knew it.

Mr. ANDREWS.—Your Honor will remember the telegram that Mr. Voorheis sent in reply to Mr. Shewan's telegram; he expressly says in it, "We want the analysis before the stuff is shipped."

The COURT.—Certainly, I should think so.

Mr. ANDREWS.—But it so happened in this case that the goods were being shipped east while the samples were being sent down to the Atolia. [92]

The COURT.—That is a question of fact, and there is evidence here the other way. I am inclined to think that the evidence of Smith is very reason-

(Testimony of E. C. Voorheis.)

able upon that subject, and that business men would not deal in any other way.

Q. Tungsten is used and was largely used during the war in the manufacture of steel, wasn't it Senator? A. Yes.

Q. Of course, I can understand that it would have to be of a grade such as they wanted it, such as they demanded. A. Yes.

Mr. ANDREWS.—Q. Senator, I show you a certificate of analysis from the Pittsburg Testing Laboratory, and I ask you if you know the signature of H. H. Craver?

A. Yes.

Q. Have you seen him write?

A. Oh, yes; he is the chief chemist in that laboratory.

Q. Is the Pittsburg Testing Laboratory the laboratory that made an analysis of this particular shipment in the east? A. Yes.

Q. Were lots 1 and 2 that were bought from the plaintiff, here, given any special designation when they were placed in the car? A. Lot No. 8.

The COURT.—Q. How did you know about that, Senator? You were not there, were you?

A. Where?

Q. Where they were put in the car.

A. No, but the papers were sent down to me.

Q. I thought they were put in the car separately?

Mr. ANDREWS.—It was like this, your Honor: Lots 1 and 2 were put in the car; they had a tag on them; this was special lot 8. [93]

(Testimony of E. C. Voorheis.)

The COURT.—Q. Who did that—Shewan?

A. Yes. You see, there were 800 sacks in this car; we use different colored tags for different lots. Warehousemen cannot always read, but they can see colors. That is the way we designate the different lots, by tags of different colors. This was designated Special Lot 8. I didn't know anything about there being lots 1 and 2.

Q. Then you had not received the telegram from Shewan that they should be kept separate?

A. If I had, I certainly would have had them kept separate.

Q. Why should Shewan telegraph to you about it anyhow, if he was buying it on his own account and simply had the privilege of shipping it in this same carload? Why would he telegraph to you? Why wouldn't he see to it himself about keeping them separate?

A. These were sold under our contract; Shewan had nothing to do with our contract.

Q. He had nothing to do with your contract in the east, at all: That is what you mean, is it?

A. That is what I mean. [94]

Mr. ANDREWS.—I offer in evidence this analysis of the Pittsburg Laboratory.

Mr. LAMONT.—This lot 8 that you have here, it is clearly understood is both lots 1 and 2?

Mr. ANDREWS.—It covers lots 1 and 2.

Mr. LAMONT.—An analysis on both lots?

Mr. ANDREWS.—Yes. It is as follows:

Defendant's Exhibit "I."

"PITTSBURGH TESTING LABORATORY.
PITTSBURGH, PENNA.
Established 1881.

COPY—May 5th, 1921.
Report No. 82229.
Client's Order No.——.

H. H. Craver,
Manager Chemical Department.

CERTIFICATE OF ANALYSIS.

February 11th, 1919.

Analysis of SHEELITE.
From Car 1 C. 140738.
Sampled by Pittsburgh Testing Laboratory Inspector at Electro Metallurgical Company, Niagara Falls, N. Y.
For Atolia Mining Company.
San Francisco, Cal.
Reported to E. J. Lavino & Company,
Philadelphia.

Mark.	Bags.	Gross.	Tare.	Net.
Lot #7	535	61106 Lbs.	588 Lbs.	60518 Lbs.
" #8	104	12035 "	124 "	11911 "
" #9	82	11118 "	90 "	11028 "
" #SA 13	140	14179 "	154 "	14025 "
Total,	861	98438 "	956 "	97482 "

	No. 7.	No. 8.	No. 9.	No. SA 13.
MOISTURE	.049%	.066%	.04%	.10%
After Drying:				
TUNGSTIC ACID	68.45%	61.87%	63.60%	61.95%
PHOSPHORUS	.057%	.146%	.254%	.021%
SULPHUR	.046%	.397%	Trace	.152%

PITTSBURGH TESTING LABORATORY,
H. H. CRAVER,
Manager Chemical Department.

(Testimony of E. C. Voorheis.)

State of Pennsylvania
County of Allegany,—ss. [95]

Before me, the undersigned authority, this day personally appeared Mr. N. A. Porter, who being duly sworn according to law, deposes and says that he is a Chemist employed by the Pittsburgh Testing Laboratory; that the above analysis was made by him; and that the same is true and correct to the best of his knowledge and belief.

NATHAN A. PORTER.

Sworn and subscribed to before me this 5th day of May, 1921.

L. O. GARNER,
Notary Public.

My commission expires March 7, 1925.

(The document was marked "Defendant's Exhibit 'I.'")

The WITNESS.—(Continuing.) That is the final analysis of the Pittsburgh Testing Laboratory.

I had charge of the sale of the ore of the Atolia Mining Company during the years I was its president. I am familiar with the market prices and the market requirements for Tungsten concentrates during that time.

Counsel thereupon offered in evidence a telegram signed by L. A. Savage dated March 19, 1919, addressed to Hon. E. C. Voorheis, 1404 Humboldt Bank Bldg., San Francisco, California. It was introduced in evidence marked "Defendant's Exhibit "J," and read as follows: [96]

(Testimony of E. C. Voorheis.)

Defendant's Exhibit "J."

"Please advise by wire if lots one and two were mixed if such is the case it was contrary to understanding of shipping agreements with your Mr. Shewan. We would be materially damaged if lot one was contaminated with other lots and we will expect settlement on lot one as per agreement and billing being forwarded in a few days.

L. A. SAVAGE."

The COURT.—Lot one contained 72 sacks?

Mr. ANDREWS.—Yes, your Honor.

The WITNESS.—(Continuing.) To be sure about the market standard I will state again that the tungstic acid should be 60 per cent or better, phosphorus not over .05% sulphur, not over 1.0% no copper. This ore was weighed and sampled by the Pittsburgh Testing Laboratory as per that certificate of analysis, and the people to whom we shipped the carload refused it on the ground that it contained phosphorus. The whole car was rejected on acount of the phosphorus content.

The market price for tungsten concentrates at the time of this rejection. I could not say offhand—was in the neighborhood of $10, maybe. This mineral dropped instantly the armistice was entered into and went down pretty much, and it has been out of sight ever since.

The car is still in the warehouse at Niagara Falls. The people refused to accept it and we are having a controversy about it now.

(Testimony of E. C. Voorheis.)

I remember Mr. Savage testifying this morning to a conversation in my office, in about February, 1919, in which he said he constantly referred to Mr. Shewan as "your Mr. Shewan." Well, I know he came in there, I don't remember just the date. He testified this morning that sometime in February, 1919, he had a conversation in my office at which some people were present, and in which he [97] constantly referred to Mr. Shewan as "your Mr. Shewan," and that I did not make any objection to that reference. I do not know that I remember any such conversation. I would not notice it. I suppose if he referred to Mr. Shewan as my Mr. Shewan he meant the Mr. Shewan who had our lease, or who had a lease from us.

Counsel thereupon offered a letter dated March 20, 1919, signed by E. C. Voorheis, president of the Atolia Mining Company, and sent to L. A. Savage and received by him, which was introduced in evidence and marked Defendant's Exhibit "K," which reads as follows:

Defendant's Exhibit "K."

"San Francisco, Cal., U. S. A., March 20, 1919.

Mr. L. A. Savage,

Reno, Nevada.

Dear Sir:

I am in receipt of your wire this morning as follows:

'Please advise by wire if lots one and two were mixed If such is the case it was con-

trary to understanding of shipping agreements with your Mr. Shewan We would be materially damaged if lot one was contaminated with other lots and we will expect settlement on lot one as per agreement and billing being forwarded in a few days.'

And we enclose you confirmation of our reply.

On March 10th we received a wire signed 'Humboldt County Mines and Mills Company,' asking when settlement could be made on shipment of tungsten ore and I enclose you a copy of that letter thinking you not have been able to see it.

This matter has been very unfortunate all the way through and the car is still intact at Niagara Falls waiting adjustment, [98] as the 32 sacks which you allowed to go with your shipment and the 18 sacks which Beck & Bean allowed to go with theirs, ruined the whole car and the whole car has been rejected.

This is a matter you will have to take up directly with Mr. Shewan as this was his transaction, not ours, nor was he acting for us in the matter in any way.

We have sent him copies of the correspondence and he thoroughly understands the situation.

Yours truly,
ATOLIA MINING COMPANY,
By E. C. VOORHEIS,
President.

ECV/M. ENC."

(Testimony of E. C. Voorheis.)

Cross-examination.

The WITNESS.—(Continuing.) This assay was made by my company on the lot involved in this suit on December 9, 1918. I could not say that at the time I sent this check for $7733.25 on February 5, 1919, that analysis had already been taken which has been introduced in evidence. I have testified that the date of the analysis of the two samples sent to the mill, marked No. 1 and No. 2 as December 9, 1918, and this letter enclosing the check for over $7000 in settlement for the amount involved in this suit was sent on February 5, 1919. My company had the analysis before it at the time it sent the check to Mr. Shewan.

When the analysis was made by the Pittsburgh Testing Laboratory, which was the official analysis, the phosphorus was twice as high as it was from the sample you sent to the mine. The analysis of December 9th indicates that the two lots were examined separately. And the Lavino lot shows the mix, and about twice [99] as much phosphorus as the other sample.

Q. As a matter of fact, on your first sample, the phosphorus in lot 2, in those two assays, ran higher than the combined sample?

A. Yes, but when you take the average, it is twice as much.

The WITNESS.—(Continuing.) I had the analysis on lot 2 as 1.57 before me at the time the check was sent to Mr. Shewan. It is not a fact that we were paid for this ore by the Lavino Com-

(Testimony of E. C. Voorheis.)

pany. We received an advance on it which has never been returned. Everybody else whose shipment went into that car was paid except the Humbolt County Tungsten Mines & Mills Company, but they were paid before we knew they had so much phosphorus. The Beck & Bean lot was paid before it was known they had so much phosphorus. We would have held up payment on their lot had they not come around for the money quite so soon. Mr. Savage would have got his money if he had been there at the time, too, but when we got a wire that the phosphorus was so high that it was rejected, we stopped the check.

Redirect Examination.

The WITNESS.—There is a suit pending at the present time brought by Atolia Mining Company against Lavino & Co., and in that suit Lavino & Co. cross-complained for the return of this money. They paid 90 per cent of our estimated value of this carload, which was over $70,000. They were owing us, then, somewhere about $45,000 or $50,000, and they refused to pay it, and a suit is pending. I had received the return on the assay made by Mr. Mosley down in San Bernardino County at the time I sent this check to Mr. Shewan and I will explain why I sent the check.

The car contained over 98,000 pounds of ore; this lot No. 2 was 3000 pounds of ore; the phosphorus content, according to the sample they sent us, the others in the car would absorb the [100] excess content as it went through; but when it was officially

(Testimony of E. C. Voorheis.)

sampled, the official sample showed twice the phosphorus in lot 8 than what their sample showed, and that was enough to kill it. The lot 1 showed in our analysis in Atolia, for phosphorus, .045, and for lot 2 it was .1 and some fraction. Lots 1 and 2 were analyzed together as one lot in Pittsburgh. My idea was that in the average of all in the car and not of the two lots the phosphorus content might come under .05.

The WITNESS.—(Continuing the following day.) I will explain to the Court how it was I sent that check for $7000 to Mr. Shewan. Some of our shipments were cash upon bill of lading. This contract was payable 60 days after sight on bill of lading. The advance payment from the people whom this car was loaded to was not paid until January 29th. On, I think, February 5, after the advance payment had been made, I supposed the carload would be all right, and on the 5th, I think it was, I mailed the check for Mr. Savage, or to Mr. Shewan, I made the check out to Mr. Shewan so that he could pay for that lot, and I think on the 11th or 12th I got a wire that the lot was rejected, and the entire car was rejected, and then I wired Mr. Shewan to hold the check, as he had not delivered it.

Testimony of B. C. Clark, for Defendant.

B. C. CLARK, a witness called and sworn on behalf of plaintiff, testified as follows:

In 1917 and for part of 1918 until about the first

(Testimony of B. C. Clark.)

of July, 1918, I was superintendent and had charge of the office at the mine of the Atolia Mining Company, at Atolia. I was in charge of the mine at the time that samples were sent from Nevada from the Humboldt County Tungsten Mines Company to Atolia, San Bernardino County, to the Atolia Mining Company. [101] Yes, I remember the testimony of Mr. Smith yesterday that two sets of samples had been made by him and given by him to Mr. Shewan and that two sets of samples were made of lots 1 and 2. As superintendent of the mill and in charge of that part of the work at the mine at Atolia I received one lot of samples marked 1 and 2. I know of no others received down there.

Testimony of R. J. Pierson, for Defendant.

R. J. PIERSON, a witness, called and sworn on behalf of defendant, testified as follows:

I am connected with the Lovelock Mercantile Banking Company and was connected with that firm in the year 1918. I had many conversations with Mr. Shewan and Mr. Savage relative to this transaction involved in this action but whether it was in the year 1918 or not, I do not know.

Mr. ANDREWS.—Q. Do you remember at any of these conversations whether or not Mr. Shewan expressed himself as being the agent of the Atolia Mining Company?

Mr. LAMONT.—We object to that as immaterial, irrelevant and incompetent. There was nothing

(Testimony of L. A. Savage.)

brought out by my cross-examination that would warrant that question. [102]

The COURT.—You are not permitted to bolster up evidence on a mere collateral circumstance.

Mr. ANDREWS.—I appreciate that, your Honor. That is all.

The COURT.—He denied it, anyhow.

Mr. ANDREWS.—Yes, I know he did, your Honor.

Mr. LAMONT.—No questions.

Mr. ANDREWS.—That is our case.

Testimony of L. A. Savage, for Plaintiff (Recalled in Rebuttal).

L. A. SAVAGE, a witness, called and sworn on behalf of plaintiff, in rebuttal, testified as follows:

At the time when this memorandum of agreement was signed, which has already been introduced in evidence, Mr. Shewan did not make any objection to the manner in which that agreement was drawn. The agreement was signed as it was originally drawn. He read that agreement before signing it. He as right in my presence standing by my desk when I dictated the agreement.

Mr. LAMONT.—Q. Did you on or about February 16, 1919, receive this telegram (handing witness telegram)?

A. I did.

Mr. LAMONT.—I offer this telegram in evidence. [103]

Mr. ANDREWS.—I object to it as immaterial,

(Testimony of L. A. Savage.)

irrelevant and incompetent. It is the same proposition, the statement by an agent as to the authority he may have had.

The COURT.—I don't understand this.

Mr. LAMONT.—You mean you don't understand what the telegram means?

The COURT.—What is this room in the Humboldt Bank Building?

Mr. ANDREWS.—That is the address of the mining company, your Honor.

The COURT.—What is the purpose of this?

Mr. LAMONT.—Simply to check up the situation and show that the plaintiff in this case was notified that payment had been awaiting them at the office, and was in Mr. Shewan's hands, sent by the Atolia Mining Company to him; in other words, it was a ratification of the transaction at that time.

The COURT.—I thought this sale was in 1918?

Mr. LAMONT.—It is, your Honor, but the money was sent in 1919.

The COURT.—Oh, yes, I see. This says: "Wire received. Have had settlement here for past week. Advise me whether to pay thru bank or not."

The balance is the address of the Atolia Mining Company. The objection is overruled.

Mr. LAMONT.—I need not read that again, I suppose?

The COURT.—No.

(The telegram was here marked "Plaintiff's Exhibit 8.")

Mr. LAMONT.—Q. I show you another telegram,

(Testimony of L. A. Savage.)

and ask you whether you received that on or about February 17th.

A. I did. Maybe I could explain the address point in that other telegram; that was in reply to a wire I sent Mr. Shewan asking him for [104] his company's address in San Francisco.

Mr. LAMONT.—I offer this telegram in evidence.

Mr. ANDREWS.—I object to this, your Honor, on the same ground, immaterial, irrelevant, and incompetent, any statements by Mr. Shewan are not binding on the company.

The COURT.—The objection is overruled.

Mr. LAMONT.—Your Honor has read this—I will not have to read it again?

The COURT.—No.

(The telegram reads as follows:)

Plaintiff's Exhibit No. 9.

Lovelock Nev 1120A Feb 17 1919.

L A Savage

Palace Hotel

San Francisco Calif

You had better call at Atolia Company's office Some difficulty over concentrate being accepted.

W. H. SHEWAN,

11sOAM."

(The document was marked "Plaintiff's Exhibit 9.")

The WITNESS.—(Continuing.) I heard Mr. Shewan's testimony in regard to a conversation in which he stated: "Isn't it a fact you are suing the

(Testimony of L. A. Savage.)

wrong party," or some words to that effect: No such conversation, to my knowledge, occurred between me and Mr. Shewan. I did not ever represent or state to Mr. Shewan at any time that either of the lots of concentrates involved in this action were free from impurities. I did not ever state that they were the best concentrates that I had ever shipped.

Cross-examination.

The WITNESS.—As to whether I told Mr. Shewan that the concentrates had any impurities in them at all, I defined the two lots, lot 1 and lot 2; lot 1 I assured him was within the market. I said about lot 2 that I had but one analysis of it and it [105] showed impurities and I took every precaution possible to have the lots kept separate, and I also advised him if he thought there was any possible chance of that lot being mixed up or being rejected, to let it go. I told him that lot 2 carried .45% copper, according to the analysis, but the phosphorus was not determined. I told him these things at the time we were loading the lots in the mill, and before they were put in the car. This was not told to him after I made the sale. It was told him when we were loading the concentrates, on the 29th, or the 27th. The sale on that particular lot was finished when it was loaded in the car.

I said in my examination in chief that I had had a conversation with Mr. Shewan in my house, that I was ill, and that he came to me and asked me to sell to him my tungsten concentrates, and at

(Testimony of L. A. Savage.)

that time he asked me to sell them to him at $23.50 per unit. After that conversation I had a conversation with him relative to the sale of this tungsten on the day of the loading. There may have been a conversation between the date of the conversation at my house and the date of the loading. At the conversation at my house no sale was consummated. He had no authority to act, and neither did I on that date. I testified that at the conversation at my house I expressed a willingness to sell for $23.50, providing my superiors in Chicago ratified that, and that he was going to ascertain from the Atolia Mining Company whether they were willing to pay that price, and afterwards he came back and said they would pay $21 a unit, and we agreed on that.

The conversation at which he and I agreed on $21 a unit took place at his second offer. I think it was at the mill, the Humboldt County Tungsten mill; I think it was. I would not say positively it was at the mill. He might have notified me by phone.

I had conversations with Mr. Shewan out at the property of the St. Anthony mine relative to this particular transaction. I [106] remember that Mr. Shewan testified that I came out to the place at the St. Anthony mines on or about the 20th of November, and that I offered to sell him 6 tons of Scheelite concentrates, but I do not remember such a conversation; I never went out there. I am positive about that.

There was never any conversation by my telephon-

(Testimony of L. A. Savage.)

ing to him on the morning of November 21st in which I stated that I would like to withdraw my previous arrangement with reference to selling the ore at $21 a unit. I never did have a telephone conversation with him about 5 o'clock or later on, in which I told him I had 12 tons and would like to sell it to him at $21.

Mr. ANDREWS.—Q. Did you ever offer him 12 tons? A. I never did.

Q. Then if you never offered him 12 tons, what were those two receipts which you made out and which he signed on November 29th, what were they for?

A. One was for the concentrates he received from the Humboldt Tungsten Mines & Mills Company.

Q. How many tons did that represent?

A. Five and one-half tons, or something like that.

Q. Approximately 6 tons, wasn't it?

A. Approximately 6 tons; yes,

Q. And now, as to the other document which you made out and which he signed, and in which he acknowledged the receipt of certain concentrates belonging to the Tungsten Company and others: You remember that receipt, don't you? A. Yes.

Q. How many tons did that represent, approximately?

A. I don't recall just what that was. I recall the lot, but I do not recall the weights.

Q. I show you Defendant's Exhibit "A." How many tons does that represent?

A. Five and one-half tons.

(Testimony of L. A. Savage.)

Q. And those two, together, represent approximately 12 tons, [107] don't they?

A. Very close to it, yes.

Q. And aren't these the 12 tons you had talked to Mr. Shewan about selling him?

A. I might have given Mr. Shewan information that there were 12 tons of concentrates for sale in the mill, but not that I had the sale of it.

Q. Didn't you prepare this document, Defendant's Exhibit "A"?

A. I did for my own protection. Your Honor, could I explain that document?

The COURT.—Certainly.

A. (Continuing.) You will understand that we have been doing custom milling; the concentrates on this sheet, known here as the Tungsten Mines Company, belonged to some shippers of ore to our mill; their milling charges, freight charges, etc., were against this ore; when they made arrangements with Mr. Shewan about purchasing this ore, I drew this up to protect us, and also to have a receipt showing how many pound there were, to give to the men who owned the concentrate; this is merely a receipt to protect me, and to protect my company for the milling charges. That was a very common practice.

The ore represented by the receipt which his Honor holds in his hand, it is marked Defendant's Exhibit "A," and the ore represented by the receipt which I myself had signed for the ore for the plaintiff, constitute, together, very close to 12 tons.

I never in any of my conversations with Mr. She-

(Testimony of L. A. Savage.)

wan, offered to sell him 12 tons; I might have told him there were 12 tons for sale; I might have informed him of that. If he got that information, it is more than likely he got it through me, or he might have got it from the owners of the concentrates. I did not [108] have 12 tons for sale. This belonged to one of our customers, and on the order of this customer these concentrates were delivered to Mr. Shewan, and no doubt go to make up the 12 tons he refers to. This instrument was simply a receipt from Mr. Shewan holding himself responsible for the milling expenses, and also for the freights, etc. I would not permit the ore to go out until he had signed a guarantee as to the milling expenses; somebody had to guarantee the milling expenses.

I would not say that at the time of my convercation with Mr. Shewan at my house when I was ill that there was nothing stated at that time with reference to the quality or the grade of the tungsten concentrates I was willing to sell. More than likely there was. I cannot remember the conversation at that time. More than likely I did say something to him about the grade of either lot 1 or lot 2. I assured him that lot 1 was within the market and that my analysis of lot 2 showed it to be carrying impurities. I told him that lot 2 carried impurities and the percentage of copper was the only impurity I knew that was contained in the lot, and for that reason. I was afraid of it on account of phosphorus. I informed Mr. Shewan fully. I had an

(Testimony of L. A. Savage.)

analysis on one-half. There were two carloads. The first carload, after being milled, an analysis was taken of it. When the combined product of the two cars were milled, there had been no further analysis made. The first analysis of approximately one-half of lot 2 showed it to be above sixty per cent WO_3, but carrying .45 of copper; I didn't have any analysis [109] as to phosphorus. I have been in the business of handling tungsten concentrates since October 20, 1916, and I am familiar with the demands of the trade in that particular. I know what the manufacturers will accept in the way of impurities. I knew at the time of the sale to Mr. Shewan that lot 2 did contain impurities. I did know that. I do not know whether I showed Mr. Shewan the assay which I had made, but I assured him that it was carrying .45 of copper. Whether I showed him the certificates of analysis, or not, I do not know. I probably told him; in fact, I know I did. As to the phosphorus content I told him I did not know what it was, because I did not know. I had an analysis on a part of the lot.

The deal was at no time definitely closed, that I would consider it closed, or himself either, until the concentrates were loaded. We talked about rejecting lot 2 in the mill, the advisability of letting it go in; the concentrates were shown to Mr. Shewan, he examined them, and we talked about them *pro* and *con*. We discussed the advisability of letting lot 2 go in; we discussed that very thoroughly. It was doubtful whether, by reason of its impurities, it

(Testimony of L. A. Savage.)

should not be placed in. That was the reason why I had him telegraph to the people that I claim he represented not to mix them. If the lot that carries the impurities happens to carry a high enough percentage of impurities, it will contaminate the lot that is fee. The objectionable thing was not placing them in a car together. It was mixing them for purposes of analysis. A lot with impurities would not contaminate so far as being placed in juxtaposition in the car. The concentrates were contained in double bags, and they were marked lots 1 and 2. That is a very common practice. I told Mr. Shewan of the existence of the impurities, as to the copper, prior to the execution of this agreement. [110]

Redirect Examination.

The WITNESS.—(Continuing.) This Defendant's Exhibit "A," the receipt signed by Mr. Shewan, in regard to 11,009 pounds of Scheelite concentrates, was a receipt meant to cover the Tungsten Dyke Mining Company's ore, otherwise known sometimes as the Beck & Bean concentrates, which went into the same car as the ore which furnishes the subject matter of this action.

Testimony of Joe Beane, for Plaintiff (In Rebuttal).

JOE BEANE, a witness called and sworn on behalf of plaintiff, in rebuttal, testified as follows:

I reside at Reno, Nevada, and on or about the 29th day of November, 1918, I had some dealings with Mr. Shewan in regard to the sale of some concen-

(Testimony of Joe Beane.)

trates which belonged to the Tungsten Dyke Mine.

Q. With whom were your dealings carried on, your negotiations?

Mr. ANDREWS.—Objected to as immaterial, irrelevant and incompetent.

The COURT.—I will let the question be answered.

To which ruling counsel for defendant excepted.

DEFENDANT'S EXCEPTION No. 7.

The WITNESS.—(Continuing.) Mr. Shewan.

Mr. LAMONT.—Q. When you received your statement of account, from whom did you receive it? A. From Mr. Shewan.

Q. Have you a copy of that statement, or the original? I believe I served a subpoena on you duces tecum. A. Yes.

Mr. LAMONT.—I offer this statement in evidence.

Mr. ANDREWS.—I object to it as immaterial, irrelevant and incompetent, it has nothing to do with this case.

The COURT.—As I said a while ago, where a question of agency in a particular transaction is in question, showing that the party has dealt as an agent for the one sought to be bound in other transactions of a similar character, it is always admissible as a circumstance.

Mr. ANDREWS.—He should have done that in his direct case. He is now trying to do that in his redirect case, and we have [111] no opportunity to meet it.

The COURT.—In his direct case he had no right to assume, excepting as your pleading foreshadowed

(Testimony of Joe Beane.)

it, that there would be any attempt to sustain that. When you do, then he is entitled to come back with corroborating circumstances. The fact is, this would not have been admissible on his main case.

Mr. LAMONT.—All I want to call the Court's attention to so far as this exhibit is concerned is the fact that it is on the letter-head of the Atolia Mining Company, and is headed "Atolia Mining Company, 1404 Humboldt Bank Building, San Francisco, California, to Beck & Bean, Dr.: Final invoice shipment lot special #9."

To which ruling counsel for defendant excepted.

DEFENDANT'S EXCEPTION No. 8.

(The document was here marked "Plaintiff's Exhibit 10" and is as follows:)

Plaintiff's Exhibit No. 10.

"ATOLIA MINING CO.
1404 Humboldt Savings Bank Building,
San Francisco.

San Francisco, Cal., Jan. 31, 1919.

Atolia Mining Company,
1404 Humboldt Bank Building,
San Francisco, California.

To

Beck & Bean, Dr.

Final Invoice Shipment Lot Special #9.

Tungsten Concentrates.

Shipped Nov. 30, 1918. in Lot SA–13.	82 sacks, gross weight	11,118	lbs.
	Tare "	90	"
	Net "	11,028	"
	Moisture .04%	4	"
	Net Dry Weight	11,024	"

[112]

5.512 tons @ 63.60% WO_3..350.5632 Units
350.5632 Units @ $21.00....$7,361.82
90% Paid 12/10/18..... 5,670.00

Balance Due $1,691.82

(In ink:)2/6/19.

TUNGSTEN DYKE MINE.
By J. BEANE.
TOM DE ARMOND.

(In pencil:) R. J. PIERSON,
Witness.

E. & O. E.,
San Francisco."

Testimony of J. C. Smith, for Plaintiff (Recalled in Rebuttal).

J. C. SMITH, a witness called and sworn on behalf of plaintiff in rebuttal, testified as follows:

I testified that the tags of the Humboldt County Tungsten Mines & Mills Company were taken off at the time these concentrates were loaded into the car. Mr. Shewan had tags; his men changed the tags as they were loading in the concentrates.

Mr. LAMONT.—What did those tags say on them?

Mr. ANDREWS.—Objected to as immaterial, irrelevant and incompetent.

The COURT.—I will let the question be answered.

To which the counsel for defendant excepted.

DEFENDANT'S EXCEPTION No. 9.

A. There were several different colored tags that Mr. Shewan had with them, with "Atolia Mining Company" stamped on them with a rubber stamp. [113]

Testimony of Frank B. Evans, for Plaintiff (Recalled in Rebuttal).

FRANK B. EVANS, a witness called and sworn on behalf of plaintiff in rebuttal, testified as follows:

Mr. Shewan did not, at the time this memorandum of agreement was signed, make any complaint as to the manner in which the agreement was drawn. The agreement was signed as originally drawn.

TESTIMONY CLOSED.

The foregoing was all the evidence in the case, and having been argued by counsel, the said Court rendered its opinion and decision in favor of the plaintiff and against the defendant as follows:

The COURT.—There is no doubt but what there are matters in the record, appearing in the correspondence, which might readily put the aspect upon this transaction that as between the Atolia Mining Company and Mr. Shewan, the Company was substantially acting as a selling agent for ores that Shewan should be able to buy,—he to have the profit upon such lots as he should buy. I gather that, under this contract of lease between Shewan and the Atolia, of the St. Anthony Mine, Shewan, during the time of holding under the lease, was getting out this product for the Atolia with which to fulfill their contracts taken with their Eastern correspondent. It would have been perfectly natural, if such were the fact—and, as I say, there are some circumstances indicating that, as between themselves, that was the relation,—it would have been perfectly natural, I say, for them, and would have been for their benefit as well as his, for him to be able to buy ostensibly on their account different lots of concentrates for the purpose [114] of filling their cars, so that they could get the better rates obtainable by reason of shipping carload lots instead of less-than-carload lots. As I say, there are circumstances that would tend to bear out that relationship as obtaining between the Atolia and Shewan. But we are not particularly concerned with that, except as it may bear upon the aspect that the transaction

took so far as the plaintiff was concerned. The plaintiff was not concerned with what may have been the real relations existing between Shewan and his principal, the Mining Company; the plaintiff was concerned only with knowing who it was dealing with. It is calling too strongly upon the credibility of any reasonable man, taking all this evidence into consideration, to say that the circumstance presented here, without any exception so far as the plaintiff was concerned, were not such as to authorize it to believe, and properly and justly so, that it was dealing with the Atolia in the sale of this property.

The letters commented upon by Mr. Andrews, passing between the president of the defendant and Mr. Savage, representing the plaintiff, after they had found that this consignment had been rejected by reason of impurities, do not militate against that view at all. It is the usual and most ordinary thing, among business men of fair disposition, to try and convince those dealing with them that they are not at fault in the transaction, and, therefore, they should not suffer the damage. That is what he was undertaking to do.

I see no escape from the conclusion, under all the facts disclosed—the pertinent facts disclosed by this transaction,—even apart from the language of the so-called receipt, which was in its nature a contract, that the Atolia Mining Company [115] held itself out to the plaintiff as the one it was dealing with, and for whom the ores were bought. That being so, equity and good conscience preclude them

from being exculpated from responsibility when a loss is incurred. It may have been, as between them and Mr. Shewan, Mr. Shewan's loss. But that is not for our consideration here. People dealing under such conditions must be aware of the fact that they are, in equity, and good conscience, precluded from taking a course which will mislead a third party dealing with them as to the relations in which they stand. And that was the case here.

Of course, I recognize that in the multifarious transactions of the world many instances arise where that feature of the transaction is not thought of until the time comes when a question of responsibility arises, and then it becomes very material.

This transaction was had in the midst of great stress, when every energy of the country was being put forth to successfully carry on the great struggle in which we were engaged; and, of course, I can readily see that people dealing as the Atolia Mining Company was—with the production of an article for the purpose of meeting one of the great demands of the war, they were doing everything they could to fulfill the demand for this valuable product. If their relations were as indicated, between themselves and Shewan, they were subordinate to the consideration of the attitude they were holding out to the plaintiff here as to what Mr. Shewan's real capacity was in the transaction, and they justified this plaintiff in believing it was dealing with the Atolia, whether it was in fact so intended or not. That being so, they must be held responsible.

Judgment will go, in accordance with the prayer of the complaint, in favor of the plaintiff. [116]

Thereafter, and on the 11th day of May, 1921, judgment was entered in favor of the plaintiff in said action and against the defendant in said action in the sum prayed for in this complaint herein, to which said ruling, order, decision and judgment the said defendant now excepts.

And now, within the time required by law and within the rules of this court, defendant proposes the foregoing as and for its bill of exceptions, and prays that the same may be settled and allowed as correct.

JOHN F. DAVIS and
W. S. ANDREWS,
Attorneys for Defendant. [117]

In the United States District Court, in and for the Southern Division of the Northern District of California, Second Division.

No. 16,243.

HUMBOLDT COUNTY TUNGSTEN MINES AND MILLS COMPANY, a Corporation,
Plaintiff,

vs.

ATOLIA MINING COMPANY, a Corporation,
Defendant and Petitioner.

Stipulation as to Correctness of Bill of Exceptions.

It is hereby stipulated and agreed that the above

and foregoing constitutes a true and correct bill of exceptions in the above-entitled action, and that the same contains all of the proceedings had and all of the evidence offered and received on the trial of said action, and all of the rulings of the Court made during the trial of said action, and that the same may be now settled and allowed as and for the bill of exceptions to such rulings, and to the decision of the Court herein.

Dated this 4th day of Oct., 1921.

CHICKERING and GREGORY,
Attorneys for Plaintiff.
JOHN F. DAVIS and
W. S. ANDREWS,
Attorneys for Defendant.

Pursuant to the above stipulation, the undersigned hereby certifies that the said bill of exceptions is in proper form and conforms to the truth and the same is hereby allowed and signed as a true bill of exceptions herein

(Sgd.) WM. C. VAN FLEET,
Judge.

Dated, Oct. 5th, 1921. [118]

[Endorsed]: Filed Oct. 5, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [119]

In the United States District Court, in and for the Southern Division of the Northern District of California, Second Division.

No. 16,243.

HUMBOLDT COUNTY TUNGSTEN MINES AND MILLS COMPANY, a Corporation,
Plaintiff,

vs.

ATOLIA MINING COMPANY, a Corporation,
Defendant and Petitioner.

Petition for Allowance of Writ of Error.

Atolia Mining Company, a corporation, defendant in the above-entitled cause, feeling itself aggrieved by the decision of the Court in the judgment entered therein on the 11th day of May, 1921, come now by Messrs. John F. Davis and W. S. Andrews, its attorneys, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the said defendant shall give and furnish upon said writ of error and that upon giving such security all former proceedings in this court be suspended and stayed until the determination of said writ of error by the United

States Circuit Court of Appeals for the Ninth Circuit.

JOHN F. DAVIS,
W. S. ANDREWS,
Attorneys for Defendant and Petitioner.

[Endorsed]: Filed July 18, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [120]

In the United States District Court, in and for the Southern Division of the Northern District of California, Second Division.

No. 16,243.

HUMBOLDT COUNTY TUNGSTEN MINES AND MILLS COMPANY, a Corporation,
Plaintiff,

vs.

ATOLIA MINING COMPANY, a Corporation,
Defendant and Petitioner.

Assignment of Errors.

Now comes Atolia Mining Company, defendant herein, and makes and files the following assignment of errors upon which it will rely in the prosecution of its writ of error in the above-entitled cause, and assigns errors in the decision and judgment in the proceedings herein as follows, to wit:

I.

That the order and judgment of the Court herein, directing that judgment be entered in favor of the

plaintiff as prayed for in the complaint, was and is error, and is hereby assigned as error.

II.

That the order and judgment of the Court herein, directing that judgment be entered in favor of the plaintiff for an amount which included the purchase price for the defective concentrates known as Lot 1, was and is error, and is hereby assigned as error.

III.

The ruling and holding of the Court herein that the plaintiff herein was entitled to a judgment against defendant in [121] any sum of money whatever, based upon the alleged cause of action set forth in said complaint, was and is error, and is hereby assigned as error.

IV.

The ruling and holding of the Court herein failing and refusing to order and enter judgment of nonsuit against plaintiff and in favor of the defendant, to which said ruling defendant then and there excepted, was and is error, and is hereby assigned as error.

V.

The failure and refusal of the Court herein to order judgment against the plaintiff and in favor of the defendant for and on each of the separate defenses set forth in the answer of defendant was and is error, and is hereby assigned as error.

VI.

The ruling and holding of the Court herein that plaintiff might introduce evidence in plaintiff's case in rebuttal for the purpose of showing that defendant had held out W. H. Shewan as its agent and for

the purpose of showing ostensible agency and agency by estoppel was and is error and is hereby assigned as error.

VII.

The decision of the Court herein that defendant had held W. H. Shewan as its agent, and that defendant was estopped to deny said agency was and is error, and is hereby assigned as error.

VIII.

The decision of the Court herein that one W. H. Shewan was the agent of the defendant in the transaction involved [122] in this action and referred to in the complaint was and is error, and is hereby assigned as error.

IX.

The ruling of the Court herein refusing the admission of the mining lease dated November 15, 1917, between Atolia Mining Company, a California corporation, and W. H. Shewan, to which ruling of the Court defendant then and there excepted, was and is error, and is hereby assigned as error.

X.

The ruling and holding of the Court herein permitting the witness L. A. Savage to answer the question, "Q. Who did Mr. Shewan at that time say he was representing?" over the objection of defendant, to which ruling defendant then and there excepted, was and is error, and is hereby assigned as error.

XI.

The ruling and holding of the Court herein admitting Plaintiff's Exhibit 6, over the objection of defendant, to which ruling of the Court defendant

then and there excepted, was and is error, and is hereby assigned as error.

XII.

The ruling and holding of the Court herein permitting the witness Savage to answer the question, "Q. Mr. Savage, do you remember a conversation which occurred on or about February 17, 1919, I believe, at 1404 Humboldt Bank Building, when a Mr. Beck was present part of the time and Mr. C. B. Nickel was present all of the time, and you and Mr. Voorheis were present all of the time?" over the objection of the defendant, to which ruling of the Court defendant then and there excepted, was and is error, and is hereby assigned as error.

XIII.

The ruling and refusal of the Court to permit the witness Savage, on cross-examination by defendant, to answer the [123] question, "Q. Mr. Savage, do you remember calling upon Mr. Shewan on or about the 20th day of November at the St. Anthony Mines, in your car, for the purpose of selling to him six tons of tungsten concentrates and offering to sell him six tons at that time?" to which ruling of the Court defendant then and there excepted, was and is error, and is hereby assigned as error.

XIV.

The ruling and holding of the Court herein in refusing to permit the defendant, in connection with the testimony of the witness Shewan, to introduce the lease, or any part of the lease, of November 15, 1917, in order to show the surrounding circumstances and relationship of the witness Shewan to the de-

fendant at the time certain telegrams between them were sent and received, to which ruling the defendant then and there excepted, was and is rror, and is hereby assigned as error.

XV.

The ruling and holding of the Court herein refusing the defendant permission to introduce the letter dated San Francisco, Cal., March 21, 1919, from E. C. Voorheis to W. H. Shewan, Lovelock, Nevada, to which ruling defendant then and there excepted, was and is error, and is hereby assigned as error.

XVI.

The ruling and holding of the Court herein refusing defendant permission to introduce the letter from W. H. Shewan, General Manager of the St. Anthony Mines Leasing Company, at Fanning, Nevada, to E. A. Stent, 1404 Humboldt Bank Building, San Francisco, California, dated May 10, 1919, to which ruling defendant then and there excepted, was and is error, and is hereby assigned as error.

XVII.

The ruling and holding of the Court herein permitting [124] the plaintiff in connection with the testimony of the witness Savage for plaintiff in rebuttal to introduce the telegram of February 16, 1919, reading, "Wire received. Have had settlement here for past week. Advise me whether to pay thru bank or not," over the objection of counsel for defendant, to which ruling defendant then and there excepted, was and is error, and is hereby assigned as error.

XVIII.

The ruling and holding of the Court herein permitting the plaintiff to introduce in evidence the telegram from W. H. Shewan, at Lovelock, Nevada, to L. A. Savage, at Palace Hotel, San Francisco, dated February 17, 1919, marked Plaintiff's Exhibit 9, over the objection of the defendant, to which ruling defendant then and there excepted, was and is error, and is hereby assigned as error.

XIX.

The ruling and holding of the Court herein permitting the witness Joe Beane for plaintiff in rebuttal to answer the question, "Q. With whom were your dealings carried on, your negotiations?" over the objection of defendant, to which ruling the defendant then and there excepted, was and is error, and is hereby assigned as error.

XX.

The ruling and holding of the Court herein permitting plaintiff to introduce in evidence Plaintiff's Exhibit No. 10, over the objection of the defendant, to which ruling defendant then and there excepted, was and is error, and is hereby assigned as error.

WHEREFORE, this defendant prays that the order and judgment of said District Court in and for the Southern Division of the Northern District of California, Second Division, be reversed, and that it have such other and further relief in the [125] premises, based on this assignment of errors, as shall seem meet.

JOHN F. DAVIS and
W. S. ANDREWS,
Attorneys for Defendant.

[Endorsed]: Filed July 18, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [126]

In the United States District Court, in and for the Southern Division of the Northern District of California, Second Division.

No. 16,243.

HUMBOLDT COUNTY TUNGSTEN MINES AND MILLS COMPANY, a Corporation,
Plaintiff,

vs.

ATOLIA MINING COMPANY, a Corporation,
Defendant and Petitioner.

Order Allowing Writ of Error.

Upon motion of John F. Davis, Esq., attorney for the above-named defendant, and upon filing a petition for a writ of error and an assignment of errors,—

IT IS ORDERED that a writ of error be and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals, for the Ninth Circuit, the judgment heretofore entered herein and that the amount of bond on said writ of error be and the same is hereby fixed at the sum of twelve thousand dollars ($12,000), said bond to serve as a cost bond, and as a supersedeas bond on said writ of error, the trial judge being absent.

(Sdg.) WM. W. MORROW,
Circuit Judge.

[Endorsed]: Filed Jul. 18, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [127]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,243.

HUMBOLDT COUNTY TUNGSTEN MINES AND MILLS COMPANY, a Corporation,
Plaintiff,

vs.

ATOLIA MINING COMPANY, a Corporation,
Defendant.

Prayer for Reversal.

To the Honorable, the Circuit Court of Appeals of the United States for the Ninth Circuit:

Comes now the Atolia Mining Company, a corporation, plaintiff in error, and prays the Court to reverse the judgment of the District Court of the United States, in and for the Southern Division of the Northern District of California, Second Division, made and entered in the above-entitled cause on the 11th day of May, 1921, and for such other and further relief as may be required by the nature of the cause.

JOHN F. DAVIS,
W. S. ANDREWS,
Attorneys for Plaintiff in Error.

[Endorsed]: Filed Jul. 18, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [128]

In the United States District Court, in and for the Southern Division of the Northern District of California, Second Division.

No. 16,243.

HUMBOLDT COUNTY TUNGSTEN MINES AND MILLS COMPANY, a Corporation, Plaintiff,

vs.

ATOLIA MINING COMPANY, a Corporation, Defendant and Petitioner.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Atolia Mining Company, a corporation, as principal, and F. W. Bradley and E. A. Stent as sureties, are held and firmly bound unto Humboldt County Tungsten Mines and Mills Company, a corporation, plaintiff in the above-entitled action, in the full and just sum of Twelve Thousand Dollars ($12,000), lawful money of the United States, to be paid to the said plaintiff, Humboldt County Tungsten Mines and Mills Company, a corporation, for which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated this 18th day of July, 1921.

WHEREAS, the above-named defendant, Atolia Mining Company, a corporation, has sued out a writ of error in the United States Circuit Court of Appeals, in and for the Ninth Circuit, to reverse the judgment in the above-entitled action in favor of the plaintiff therein and against the Atolia Mining Company, a corporation, defendant therein, for the sum of Nine Thousand Three Hundred and 90/100 Dollars ($9,300.90), One [129] Hundred Fifty-one and 45/100 Dollars ($151.45) costs and interest.

NOW, THEREFORE, the condition of this obligation is such that if the above-named Atolia Mining Company, a corporation, shall prosecute such writ of error to effect and answer all damages and costs if it shall fail to make good said plea, then this obligation shall be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, said Atolia Mining Company, a corporation, principal, has caused its name to be hereunto subscribed and its corporate seal to be hereunto affixed by officers thereunto duly authorized, and the said F. W. Bradley and E. A. Stent, sureties, have hereunto set their hands and seals this 18th day of July, 1921.

ATOLIA MINING COMPANY,
By F. W. BRADLEY,
Its Vice-president.
And by E. A. STENT,
Its Secretary.
F. W. BRADLEY.
E. A. STENT.

[Seal Atolia Mining Co.]

United States of America,
Northern District of California,—ss.

F. W. Bradley and E. A. Stent, being duly sworn, each for himself deposes and says that he is a freeholder in said District and is worth the sum of Twelve Thousand Dollars exclusive of property exempt from execution and over and above all debts and liabilities.

F. W. BRADLEY.
E. A. STENT.

Subscribed and sworn to before me this 18th day of July, 1921.

[Seal] W. W. HEALEY,
Notary Public in and for the City and County of San Francisco, State of California. [130]

The within bond is approved July 18, 1921.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: Filed Jul. 18, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [131]

(Title of Court and Cause.)

(Praecipe for Record on Writ of Error.)

To the Clerk of Said Court:

Sir: Please prepare transcript on writ of error as follows:

Judgment-roll.

Bill of exceptions.

Plaintiff's original subpoena.
Petition for writ of error.
Assignment of errors.
Order allowing writ of error.
Prayer for reversal.
Bond on writ of error.
Writ of error.
Citation on writ of error.
Stipulation and orders extending time to make, serve and file bill of exceptions.
Order extending time beyond term of court for settlement of bill of exceptions.
Praecipe.

JOHN F. DAVIS and
W. S. ANDREWS,
Attorneys for Defendant.

[Endorsed]: Filed Oct. 6, 1921. Walter B. Maling, Clerk. [132]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,243.

HUMBOLDT COUNTY TUNGSTEN MINES and MILLS COMPANY, a Corporation,
Plaintiff,

vs.

ATOLIA MINES COMPANY, a Corporation,
Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing one hundred thirty-two (132) pages, numbered from 1 to 132, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $54.95; that said amount was paid by the defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 10th day of October, A. D. 1921.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [133]

In the United States District Court, in and for the Southern Division of the Northern District of California, Second Division.

No. 16,243.

HUMBOLDT COUNTY TUNGSTEN MINES AND MILLS COMPANY, a Corporation, Plaintiff,

vs.

ATOLIA MINING COMPANY, a Corporation, Defendant and Petitioner.

Writ of Error.

The United States of America,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States, for the Southern Division of the Northern District of California, Second Division, GREETING:

Because in the record and proceedings, as also in the rendition of a judgment, of a plea which is in the said District Court, before you, or some of you, between Humboldt County Tungsten Mine and Mills Company, a corporation, plaintiff, and Atolia Mining Company, a corporation, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said defendant and plaintiff in error, as by this complaint doth appear, and that, being willing that error, if any hath been should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do

command you, if the judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at the City and County of San Francisco, in the State of California, within [134] thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 18th day of July, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal] WALTER B. MALING,
Clerk of the United States District Court for the Northern District of California.

J. A. Shaertzer,
Deputy Clerk. [135]

Receipt of a copy of the within and attached writ of error is hereby admitted this 18th day of July, 1921.

CHICKERING & GREGORY,
Attorneys for Plaintiff.

[Endorsed]: No. 16,243. In the United States District Court, in and for the Southern Division of

the Northern District of the State of California, Second Division. Humboldt County Tungsten Mines and Mills Company, a Corporation, Plaintiff, vs. Atolia Mining Company, a Corporation, Defendant. Writ of Error. Filed Jul. 18, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Return to Writ of Error.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [136]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Humboldt County Tungsten Mines and Mills Company, a Corporation, Plaintiff, and to Chickering and Gregory, Its Attorneys, GREETING:

You are hereby cited and admonished to be and

appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court, in and for the Southern Division of the Northern District of California, Second Division, wherein Atolia Mining Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. W. MORROW, United States Circuit Judge for the Ninth Circuit, this 18th day of July, A D. 1921.

WM. W. MORROW,
United States Circuit Judge. [137]

Receipt of a copy of the within and attached citation is admitted this 18th day of July, 1921.

CHICKERING & GREGORY,
Attorneys for Plaintiff.

[Endorsed]: No. 16,243. In the United States District Court, in and for the Southern Division of the Northern District of the State of California, Second Division. Humboldt County Tungsten Mines and Mills Company, a Corporation, Plaintiff, vs. Atolia Mining Company, a Corporation, Defendant. Citation upon Writ of Error. Filed Jul. 18,

1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3784. United States Circuit Court of Appeals for the Ninth Circuit. Atolia Mining Company, a Corporation, Plaintiff in Error, vs. Humboldt County Tungsten Mines and Mills Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filed October 10, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

ATOLIA MINING COMPANY, a Corporation,
Plaintiff in Error,

vs.

HUMBOLDT COUNTY TUNGSTEN MINES AND MILLS COMPANY, a Corporation,
Defendant in Error.

Order Extending Time to and Including September 16, 1921, to File Record on Writ of Error and to Docket Cause.

GOOD CAUSE BEING SHOWN, IT IS HEREBY ORDERED that the plaintiff in error may have to and including the 16th day of September, 1921, within which to file the record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at San Francisco, Calif., August 12, 1921.

WM. W. MORROW,

Judge of the United States Circuit Court of Appeals.

[Endorsed]: No. 3784. In the United States Circuit Court of Appeals for the Ninth Circuit. Atolia Mining Company, a Corporation, Plaintiff in Error, vs. Humboldt County Tungsten Mines & Mills Company, a Corporation, Defendant in Error. Order Extending Time to File Record on Writ of Error and to Docket Cause. Filed Aug. 12, 1921. F. D. Monckton, Clerk. Refiled Oct. 10, 1921. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

ATOLIA MINING COMPANY, a Corporation,
Plaintiff in Error,

vs.

HUMBOLDT COUNTY TUNGSTEN MINES AND MILLS COMPANY, a Corporation,
Defendant in Error.

Order Extending Time to and Including October 16, 1921, to File Record on Writ of Error and to Docket Cause.

GOOD CAUSE BEING SHOWN, IT IS HEREBY ORDERED that the plaintiff in error may have to and including the 16th day of October, 1921, within which to file the record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at San Francisco, Calif., September 8, 1921.

WM. W. MORROW,
Judge of the United States Circuit Court of Appeals.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. Atolia Mining Company, a Corporation, Plaintiff in Error, vs. Humboldt County Tungsten Mines and Mills Company, a Corporation, Defendant in Error. Order Extending Time to File Record on Writ of Error and to Docket Cause. Filed Sep. 8, 1921.

F. D. Monckton, Clerk. Refiled Oct. 10, 1921. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

ATOLIA MINING COMPANY, a Corporation,
Plaintiff in Error,

vs.

HUMBOLDT COUNTY TUNGSTEN MINES AND MILLS COMPANY, a Corporation,
Defendant in Error.

Order Extending Time to and Including November 15, 1921, to File Record on Writ of Error and to Docket Cause.

GOOD CAUSE BEING SHOWN, IT IS HEREBY ORDERED that the plaintiff in error may have to and including the 15th day of November, 1921, within which to file the record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at San Francisco, Calif., October 5, 1921.

WM. W. MORROW,
Judge of the United States Circuit Court of Appeals.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Atolia Mining Company, a Corporation, Plaintiff in Error, vs. Humboldt County Tungsten Mines and Mills Co., a Corporation, Defendant in Error. Order Extending Time to File Record on Writ of Error and to Docket Cause. Filed Oct. 5, 1921. F. D. Monckton, Clerk. Refiled Oct. 10, 1921. F. D. Monckton, Clerk.

No. 3785

United States

Circuit Court of Appeals

For the Ninth Circuit.

VACUUM OIL COMPANY, PROPRIETARY, LTD., a Corporation,
Appellant,

vs.

H. W. WESTPHAL, D. VON DER MEHDEN, HENRY FRISCHE, CHAS. NONNEMANN, HENRY WELLMAN, LILLY BRUCKMANN, C. ZEUTHEN, CARL VON DER MEHDEN, ROBT. F. ELDER, C. F. LURMANN, BETTY VON CLEVE, THUSNELDA WILKENS, CLARA OLIVER, F. B. KLOPPER, LOUISE SCHNABEL, SANDERS & KIRCHMANN, INC., a Corporation, and SCHOONER OWNERS COMPANY, a Corporation, Owners of the American Schooner, "COMMERCE,"
Appellees.

Apostles on Appeal.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3785

United States

Circuit Court of Appeals

For the Ninth Circuit.

VACUUM OIL COMPANY, PROPRIETARY, LTD., a Corporation,
Appellant,

vs.

H. W. WESTPHAL, D. VON DER MEHDEN, HENRY FRISCHE, CHAS. NONNEMANN, HENRY WELLMAN, LILLY BRUCKMANN, C. ZEUTHEN, CARL VON DER MEHDEN, ROBT. F. ELDER, C. F. LURMANN, BETTY VON CLEVE, THUSNELDA WILKENS, CLARA OLIVER, F. B. KLOPPER, LOUISE SCHNABEL, SANDERS & KIRCHMANN, INC., a Corporation, and SCHOONER OWNERS COMPANY, a Corporation, Owners of the American Schooner, "COMMERCE,"
Appellees.

Apostles on Appeal.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Southern Division of the District Court of the United States in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,701.

SAN MATEO REALTY & SECURITY COMPANY, a Corporation, D. VON der MEHDEN, HENRY FRISCHE, CHAS. NONNENMANN, HENRY WELLMAN, LILLY BRUCKMANN, C. ZEUTHEN, CARL VON der MEHDEN, ROBT. F. ELDER, C. F. LURMANN, BETTY VON CLEVE, TILLMAN & BENDEL, a Corporation, CLARA OLIVER, F. B. KLOPPER, LOUISE SCHNABEL, SANDERS & KIRCHMANN, INC., a Corporation, and SCHOONER OWNERS COMPANY, a Corporation, Owners of the American Schooner "COMMERCE,"

Libelants,

vs.

VACUUM OIL CO., PROPRIETARY, LTD.,

Respondent.

Praecipe for Apostles on Appeal.

To the Clerk of the Above-entitled Court:

Please prepare transcript of record in this cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, upon the appeal heretofore perfected in this court and include in said transcript the following:

(1) All those papers, documents and data re-

quired by Subparagraph (1) of Section 1 of Rule 4 of the Rules in Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit.

(2) All the pleadings in the cause with the exhibits annexed thereto. [1*]

(3) All the testimony and other proofs adduced in the cause, including the testimony taken at the trial, all depositions taken by either party and admitted in evidence, including the matter appended to the deposition of Charles Anderson, being all that certain matter appearing on pages 19 and 20, inclusive, of the typewritten transcript of said deposition; and all exhibits introduced by either party, said exhibits to be sent up as original exhibits.

(4) All opinions of the Court, whether on interlocutory questions or finally deciding the cause.

(5) The final decree.

(6) The notice of appeal.

(7) The assignments of error.

(8) All stipulations and orders extending time for printing the record and filing and docketing the cause on appeal.

PILLSBURY, MADISON & SUTRO,
Proctors for Respondent.

[Endorsed]: Filed Sep. 16, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [2]

*Page-number appearing at foot of page of original certified Apostles on Appeal.

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

No. 16,701.

SAN MATEO REALTY & SECURITY COMPANY, a Corporation, et al.,

Libelants,

vs.

VACUUM OIL CO., PROPRIETARY, LTD.,

Respondent.

Statement of Clerk U. S. District Court.

PARTIES.

Libelants: San Mateo Realty & Security Company, a Corp., D. Von der Mehden, Henry Frische, Charles Nonnenmann, Henry Wellman, Lilly Bruckmann, C. Zeuthen, Carl Von der Mehden, Robert F. Elder, C. F. Lurmann, Betty Von Cleve, Tillman & Bendel, Clara Oliver, F. H. Klopper, Louise Schnabel, Sanders & Kirchmann, Inc., a Corp., and Schooner Owners Company, a Corp., Owners of the American Schooner "Commerce."

Substituted Libelants: H. W. Westphal (substituted for San Mateo Realty & Security Company, a Corp.); Thusnelda Wilkens (substituted for Tillman and Bendel, a Corp.).

Respondent: Vacuum Oil Company, Proprietary, Ltd. [3]

PROCTORS.

For Libelants: WILLIAM DENMAN, Esq., San Francisco, California.

For Respondent: Messrs. PILLSBURY, MADISON & SUTRO, San Francisco, Cal.

PROCEEDINGS.

1919.

October 22. Filed libel on charter-party.

Issued citation for appearance of respondent, which was filed on return October 28, 1919, with the following return of the U. S. Marshal endorsed thereon:

"I have served this writ personally, by copy on C. A. Blumer, Agent of Vacuum Oil Co., Proprietary, Ltd., at San Francisco, California, Ser. at 1:30 P. M., this 22d day of Oct., A. D. 1919.

JAS. P. HOLOHAN,
U. S. Marshal,
By Thos. F. Mulhall,
Deputy Marshal."

28. Filed citation on return.

30. Filed appearance of respondent.

December 4. Filed exceptions to libel.

6. Hearing was this day had on the exceptions to libel, Hon. Frank H. Rudkin, Judge, presiding. Ordered exceptions overruled, except the exceptions to notice which were sustained. [4]

December 11. Filed amended libel.
16. Filed exceptions to amended libel.

1920.

January 31. Hearing upon exceptions to amended libel, Hon. Frank H. Rudkin, Judge, presiding. After hearing counsel, it was ordered that the exceptions be withdrawn.

February 2. Filed amendment to amended libel.
7. Filed answer of respondent.

November 19. Filed deposition of A. Beattie, a witness on behalf of libelant.
Filed deposition of Charles Anderson, a witness on behalf of libelant.

1921.

March 1. Filed deposition of Henry Kirschman, Jr., a witness on behalf of libelant.

April 21. Hearing was this day had, Honorable JEREMIAH NETERER, Judge, presiding.
22. Hearing was this day resumed. Cause submitted.

June 11. Filed opinion in which it was ordered that a decree be entered in favor of libelants.
13. Filed reporter's transcript.
21. Filed final decree.

September 16. Filed notice of appeal.
Filed assignment of errors.

Filed bond on appeal in the aggregate sum of $25,250, with American Surety Company of N. Y., as surety. [5]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY.

SAN MATEO R. & S. CO., D. VON der MEHDEN, HENRY FRISCHE, CHAS. NONNENMANN, HENRY WELLMAN, LILLY BRUCKMANN, C. ZEUTHEN, CARL VON der MEHDEN, ROBT. F. ELDER, C. F. LURMANN, BETTY VON CLEVE, TILLMAN & BENDEL, CLARA OLIVER, F. H. KLOPPER, LOUISE SCHNABEL, SANDERS & KIRCHMANN, INC., and SCHOONER OWNERS CO., Owners of the American Schooner "COMMERCE,"

Libelants,

vs.

VACUUM OIL CO., PROPRIETARY, LTD.,

Respondent.

Libel on Charter-party.

To the District Court of the United States, for the Northern District of California, in Admiralty:

The libel of the above-named libelants in a cause of contract, civil and maritime, alleges as follows:

I.

That on or about the 19th day of November, 1918, libelants were the owners of the American schooner "Commerce" and have been the said owners at all times since; that on or about said day, the libelants and respondent entered into a certain charter-party for the charter of the said American schooner "Commerce," a copy whereof is hereunto annexed and hereby made a part hereof; that thereafter, the said vessel did arrive at the port of San Francisco and did berth at the loading dock designated by respondent and was there ready to load many days before the expiration of the 110 days described in the said charter-party, and that after being so ready to load, and before the expiration of said 110 days, the libelants did give notice of the readiness to load to the respondent; that thereafter, the respondent, without any cause therefor, did notify libelants that it cancelled the said charter, and declined to perform the conditions and agreements thereof. [6]

II.

That respondent is, and at all times herein referred to has been, a corporation duly organized and existing under the laws of one of the states of the United States.

III.

That libelants have, at all times, performed all the conditions and agreements in the said charter-party agreed by them to be performed up to the time of the said notice of cancellation of the said charter-party, but that respondent has failed and

refused to and declared that it will not perform its agreement to furnish the cargo agreed upon in the said charter-party, and has failed and refuses to perform any of the conditions and agreements by it agreed upon in the said charter-party.

IV.

That by reason of the said refusal the libelants have been damaged in the amount of $30,000.00, and upwards, no part of which has been paid to libelants.

V.

That all and singular the premises are true, and within the jurisdiction of this Honorable Court.

WHEREFORE, libelants pray that process in due form according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against respondent, and that it may be compelled to appear and answer, upon oath, all and singular the matters aforesaid, and that this Honorable Court will be pleased to decree payment for the damages aforesaid, with costs, and that libelants may have such other and further relief as they may be entitled to receive.

WILLIAM DENMAN,
Proctor for Libelants. [7]

State of California,
City and County of San Francisco.—ss.

Henry Kirchmann, being first duly sworn, deposes and says:

That he is an officer of Sanders & Kirchmann, Inc., to wit, the ——— thereof, one of the libelants

herein; that as such officer he is duly authorized to make this verification for and on its behalf; that he has read the foregoing libel and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he believes it to be true.

HENRY KIRCHMAN.

Subscribed and sworn to before me, this 22d day of October, 1919.

[Seal] KATHRYN E. STONE,
Notary Public, in and for the City and County of San Francisco, State of California. [8]

[Endorsed]: Filed Oct. 22, 1919. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [9]

In the United States District Court, in and for the Southern Division of the Northern District of California, First Division.

IN ADMIRALTY—No. 16,701.

SAN MATEO R. & S. CO., D. VON der MEHDEN, HENRY FRISCHE, CHAS. NONNENMANN, HENRY WELLMAN, LILLY BRUCKMANN, C. ZEUTHEN, CARL VON der MEHDEN, ROBT. F. ELDER, C. F. LURMANN, BETTY VON CLEVE, TILLMAN & BENDEL, CLARA OLIVER, F. H. KLOPPER, LOUISE SCHNABEL,

SANDERS & KIRCHMANN, INC., and SCHOONER OWNERS CO., Owners of the American Schooner "COMMERCE,"

Libelants,

vs.

VACUUM OIL CO., PROPRIETARY, LTD.,

Respondent.

Exceptions to Libel.

To the Honorable M. T. DOOLING, Judge of the Southern Division of the United States District Court, for the Northern District of California, First Division:

The exceptions of Vacuum Oil Co., Proprietary, Ltd., a corporation, respondent above named, to the libel herein, allege as follows:

I.

That said libel does not state facts sufficient to constitute a cause of action.

II.

That said libel is insufficient and indefinite in that:

(a) That it cannot be ascertained therefrom whether [10] San Mateo R. & S. Co., Tillmann & Bendel, Sanders & Kirchmann, Inc., and Schooner Owners Co., are or either of them is a corporation.

(b) That it cannot be ascertained therefrom when the schooner "Commerce" arrived at the port of San Francisco, as alleged in Article I thereof.

(c) That it cannot be ascertained therefrom how often the schooner "Commerce" arrived at the port

of San Francisco subsequent to the 19th day of November, 1918.

(d) That it cannot be ascertained therefrom at what loading dock the schooner "Commerce" did berth, as alleged in Article I thereof.

(e) That it cannot be ascertained therefrom when said schooner "Commerce" became ready to load, as alleged in Article I thereof.

(f) That it cannot be ascertained therefrom when 110 days, described in said charter-party, expired, as alleged in Article I thereof.

(g) That it cannot be ascertained therefrom when libelants gave notice to respondent of the readiness to load, as alleged in Article I thereof.

(h) That it cannot be ascertained therefrom where said notice was given.

(i) That it cannot be ascertained therefrom to whom said notice was given.

(j) That it cannot be ascertained therefrom whether said notice was given to an officer or agent of respondent.

(k) That it cannot be ascertained therefrom to what officer or agent of respondent said notice was given.

(l) That it cannot be ascertained therefrom whether said notice was in writing or verbal. [11]

(m) That it cannot be ascertained therefrom how said notice was given.

(n) That it cannot be ascertained therefrom how libelants have performed all the conditions and agreements in said charter-party, as alleged in Article III thereof.

(o) That it cannot be ascertained therefrom whether the said schooner "Commerce" was tight, staunch, strong and in every way fitted for the voyage described in the charter-party, mentioned in said libel, including proper dunnage.

(p) That it cannot be ascertained therefrom how libelants have been damaged, as alleged in Article IV thereof.

(q) That it cannot be ascertained therefrom how many cases of petroleum products constitute a full cargo for said vessel.

(r) That it cannot be ascertained therefrom how much sawn lumber or barrel goods constitute a full on deck cargo for said vessel.

WHEREFORE, respondent prays that it be hence dismissed with its costs.

Dated: December 4, 1919.

PILLSBURY, MADISON & SUTRO,
Proctors for Respondent Vacuum Oil Co., Proprietary, Ltd., a Corporation.

Received copy of the within exceptions to libel this 4th day of December, 1919.

WILLIAM DENMAN,
Proctor for Libellant.

[Endorsed]: Filed Dec. 4, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [12]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the City and County of San Francisco, State of California, on Saturday, the sixth day of December, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable FRANK H. RUDKIN, Judge.

No. 16,701.

SAN MATEO R. & S. CO. et al.

vs.

VACUUM OIL CO.

(Order Overruling Exceptions to Libel, in Part.)

This cause came on regularly this day for hearing on exceptions to libel filed herein. After hearing the respective proctors herein, the Court ordered that said exceptions be overruled except the exceptions to notice, which is hereby sustained. [13]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY.

SAN MATEO REALTY & SECURITY COMPANY, a Corporation, D. VON der MEHDEN, HENRY FRISCHE, CHAS. NONNENMANN, HENRY WELLMAN, LILLY

BRUCKMANN, C. ZEUTHEN, CARL VON der MEHDEN, ROBT F. ELDER, C. F. LURMANN, BETTY VON CLEVE, TILLMANN & BENDEL, a Corporation, CLARA OLIVER, F. B. KLOPPER, LOUISE SCHNABEL, SANDERS & KIRCHMANN, INC., a Corporation, and SCHOONER OWNERS COMPANY, a Corporation, Owners of the American Schooner, "COMMERCE,"

Libelants,

vs.

VACUUM OIL CO., PROPRIETARY, LTD.,

Respondent.

Amended Libel on Charter-party.

To Honorable M. T. DOOLING, Judge of the United States District Court for the Northern District of California:

Now come the libelants above named and pursuant to an order of court made herein file this their amended libel in a cause of contract, civil and maritime, and allege as follows:

I.

That San Mateo Realty & Security Company, one of the libelants above named, is a corporation duly organized and existing under and by virtue of the laws of California, with its principal place of business situate in the City and County of San Francisco, State of California; that Tillman & Bendel, one of the libelants above named, is a corporation duly organized and existing under and by virtue of

the laws of California, with its principal place of business situate in the City and County of San Francisco, State of California; that Sanders & Kirchmann, Inc., one of the libelants above named, is a corporation duly organized and existing under and by virtue of the laws of California, with its principal place of [14] business situate in the City and County of San Francisco, State of California; that Schooner Owners Company, one of the libelants above named, is a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business situate in the City and County of San Francisco, State of California.

II.

That respondent is, and at all times herein referred to has been, a corporation duly organized and existing under the laws of the states of the United States.

III.

That on or about the 19th day of November, 1918, libelants were the owners of the American schooner "Commerce" and have been the said owners at all times since; that on or about said day, the libelants and respondent entered into a certain charter-party for the charter of the said American schooner "Commerce," a copy whereof is hereunto annexed and hereby made a part hereof; that hereafter, the said vessel did arrive at the Port of San Francisco and did berth at the loading dock designated by respondent and was there ready to load many days before the expiration of the one hundred ten (110)

days described in the said charter-party; that on or about the 16th day of September, 1919, and before the expiration of the said one hundred ten (110) days, at the City and County of San Francisco, State of California, the libelants, in accordance with the provisions of said charter-party, did give verbal notice to the respondent of the readiness to load of said American schooner "Commerce," that thereafter, the respondent, without any cause therefor, did notify libelants that it cancelled the said charter, and declined to perform the conditions and agreements thereof.

IV.

That libelants have, at all times, performed all the conditions and agreements in the said charter-party agreed by them to be performed [15] up to the time of the said notice of cancellation of the said charter-party, but that respondent has failed and refuses to and declared that it will not perform its agreements to furnish the cargo agreed upon in the said charter-party, and has failed and refuses to perform any of the conditions and agreements by it agreed upon in the said charter-party.

V.

That by reason of the said refusal, the libelants have been damaged in the amount of $30,000.00, and upwards, no part of which has been paid to libelants.

VI.

That all and singular the premises are true, and within the jurisdiction of this Honorable Court.

WHEREFORE, libelants pray that process in due form according to the practice of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against respondent, and that it may be compelled to appear and answer, upon oath, all and singular the matters aforesaid, and that this Honorable Court will be pleased to decree payment for the damages aforesaid, with costs, and that libelants may have such other and further relief as they may be entitled to receive.

WILLIAM DENMAN,
Proctor for Libelants. [16]

State of California,
City and County of San Francisco,—ss.

Henry Kirchmann, being first duly sworn, deposes and says:

That he is an officer of Sanders & Kirchmann, Inc., a corporation, to wit, the secretary thereof, one of the libelants herein; that as such officer he is duly authorized to make this verification for and on its behalf.

That he has read the foregoing amended libel and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he believes it to be true.

HENRY KIRCHMANN.

Subscribed and sworn to before me, this 11th day of December, 1919.

[Seal] KATHRYN E. STONE,
Notary Public, in and for the City and County of San Francisco, State of California. [17]

Receipt of a copy of the within amended libel is hereby admitted this 11th day of December, 1919.

PILLSBURY, MADISON & SUTRO,
Attorneys for Respondent.

[Endorsed]: Filed Dec. 11, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [18]

In the United States District Court, in and for the Southern Division of the Northern District of California, First Division.

IN ADMIRALTY—No. 16,701.

SAN MATEO R. & S. CO., D. VON der MEHDEN, HENRY FRISCHE, CHAS. NONNENMANN, HENRY WELLMAN, LILLY BRUCKMANN, C. ZEUTHEN, CARL VON der MEHDEN, ROBT. F. ELDER, C. F. LURMANN, BETTY VON CLEVE, TILLMANN & BENDEL, CLARA OLIVER, F. H. KLOPPER, LOUISE SCHNABEL, SANDERS & KIRCHMANN, INC., and SCHOONER OWNERS CO., Owners of the American Schooner "COMMERCE,"
Libelants,

vs.

VACUUM OIL CO., PROPRIETARY, LTD.,
Respondent.

Exceptions to Amended Libel.

To the Honorable M. T. DOOLING, Judge of the Southern Division of the United States District Court, for the Northern District of California, First Division:

The exceptions of Vacuum Oil Co., Proprietary, Ltd., a corporation, respondent above named, to the amended libel herein, allege as follows:

I.

That respondent excepted to the original libel on file herein for the following grounds among others:

"That said libel is insufficient and indefinite in that . . . .

(g) That it cannot be ascertained therefrom when libelants gave notice to respondent of the readiness to load, as alleged in Article 1 thereof. [19]

(h) That it cannot be ascertained therefrom where said notice was given.

(i) That it cannot be ascertained therefrom to whom said notice was given.

(j) That it cannot be ascertained therefrom whether said notice was given to an officer or agent of respondent.

(k) That it cannot be ascertained therefrom to what officer or agent of respondent said notice was given.

(m) That it cannot be ascertained therefrom how said notice was given."

That said exceptions were sustained by the above-entitled court on the 6th day of December, 1919.

That in said amended libel no effort has been made to make the same sufficient or definite in said particulars, but that the same is as to said matters identical with the original libel on file herein.

II.

That said libel does not state facts sufficient to constitute a cause of action.

III.

That said libel is insufficient and indefinite in that:

(a) That it cannot be ascertained therefrom when the schooner "Commerce" arrived at the port of San Francisco, as alleged in article III thereof.

(b) That it cannot be ascertained therefrom how often the schooner "Commerce" arrived at the port of San Francisco subsequent to the 19th day of November, 1918.

(c) That it cannot be ascertained therefrom at what loading dock the schooner "Commerce" did berth, as alleged in [20] Article III thereof.

(d) That it cannot be ascertained therefrom when said schooner "Commerce" became ready to load, as alleged in Article III thereof.

(e) That it cannot be ascertained therefrom when 110 days, described in said charter-party, expired, as alleged in Article III thereof.

(f) That it cannot be ascertained therefrom how libelants have performed all the conditions and agreements in said charter-party, as alleged in Article IV thereof.

(g) That it cannot be ascertained therefrom whether the said schooner "Commerce" was tight,

staunch, strong and in every way fitted for the voyage described in the charter-party, mentioned in said libel, including proper dunnage.

(h) That it cannot be ascertained therefrom how libelants have been damaged, as alleged in Article V thereof.

(i) That it cannot be ascertained therefrom how many cases of petroleum products constitute a full cargo for said vessel.

(j) That it cannot be ascertained therefrom how many cases of petroleum products constitute a full on deck cargo for said vessel.

WHEREFORE, respondent prays that it be hence dismissed with its costs.

Dated: December 16, 1919.

PILLSBURY, MADISON & SUTRO,
Proctors for Respondent.

Received copy of the within exceptions to amended libel this 16th day of December, 1919.

WILLIAM DENMAN,
Proctor for Libellants.

[Endorsed]: Filed Dec. 16, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [21]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Saturday, the thirty-first day of January, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable FRANK H. RUDKIN, Judge.

No. 16,701.

SAN MATEO R. & S. CO.

vs.

VACUUM OIL CO etc.

(Order for Withdrawal of Exceptions to Amended Libel.)

This cause came on regularly this day for hearing on exceptions to amended libel. After hearing counsel herein, the Court ordered that exceptions be withdrawn. [22]

In the United States District Court, in and for the Southern Division of the Northern District of California, First Division.

IN ADMIRALTY—No. 16,701.

SAN MATEO R. & S. CO. et al.,

Libelants,

vs.

VACUUM OIL CO., PROPRIETARY, LTD.,

Respondent.

Amendment to Amended Libel.

NOW COME the libelants above named, by William Denman, Esq., their proctor, and by leave of Court first had and obtained, amend their amended libel on file herein, by inserting in pargraph III of said amended libel the following, to wit:

"at said loading dock and"

after the word "day" and before the word "at," in line 20, on page 2 of said amended libel.

Dated: January 31st, 1920.

WILLIAM DENMAN,
Proctor for Libelants.

[Endorsed]: Filed Feb. 2, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [23]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,701.

SAN MATEO REALTY & SECURITY COMPANY, a Corporation, D. VON der MEHDEN HENRY FRISCHE, CHAS, NONNENMANN, HENRY WELLMAN, LILLY BRUCKMANN, C. ZEUTHEN, CARL VON der MEHDEN, ROBT. F. ELDER, C. F. LURMAN, BETTY VON CLEVE, TILLMANN & BENDEL, a Corporation, CLARA OLIVER, F. B. KLOPPER, LOUISE

SCHNABEL, SANDERS & KIRCHMANN, INC., a Corporation, and SCHOONER OWNERS COMPANY, a Corporation, Owners of the American Schooner, "COMMERCE,"

Libelants,

vs.

VACUUM OIL CO., PROPRIETARY, LTD.,

Respondent.

Answer.

To the Honorable MAURICE T. DOOLING, Judge of the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division:

The answer of the Vacuum Oil Co., Proprietary, Ltd., to the amended libel as amended again January 31, 1920, admits, denies and alleges as follows:

I.

With respect to the averments of Article I of said libel, respondent for want of knowledge denies that the libelants therein mentioned are corporations, or that any of them is a corporation.

II.

With respect to the averments of Article II of said [24] libel, respondent admits that it is and has been a corporation, and denies that it ever has been organized or existing under the laws of one of the States of the United States, and in this behalf alleges that it is, and at all times in said libel referred to has been organized and existing under the laws of the Commonwealth of Australia.

III.

With respect to the allegations of Article III of said libel, respondent for want of knowledge denies that libelants were the owners of the schooner "Commerce" on or about the 19th day of November, 1918, or at any time, and that they had been the owners at all or any time since. Further answering said article, respondent admits that libelants and respondent entered into the charter-party therein referred to; admits that said vessel did arrive at the Port of San Francisco, and did berth at a loading dock, but for want of knowledge denies that said vessel was there ready to load many, or any, days before the expiration of the 110 days described in said charter-party. Further answering said article, respondent denies that on or about the 16th day of September, 1919, or before the expiration of said 110 days, or at any time, at said loading dock, or at the City and County of San Francisco, State of California, or at any place, libelants in accordance with the provisions of said charter-party, or otherwise, did give verbal or other notice to respondent of the readiness to load of said schooner. Further answering said article, respondent denies that respondent, without any cause therefor, did notify libelants that it cancelled the said charter, or declined to perform the conditions and agreements thereof, and in this behalf respondent alleges that on the 11th day of [25] October, 1919, respondent delivered to libelants a written communication, a copy whereof is hereunto annexed and marked Exhibit "A," and hereby referred to and made a part hereof the same

as if herein set forth at length; that all the statements made in said communication are true; that respondent never notified libelants that it cancelled said charter, or declined to perform the conditions or agreements thereof, except as set forth in said notice.

IV.

With respect to averments of Article IV of said libel, respondent denies that libelants have at all or any times performed all or any of the conditions or agreements in the said charter-party agreed by them to be performed up to the time of the said notice of cancellation of the said charter-party, or up to any time, and denies that respondent has failed or refused to, or declared that it will not perform its agreements to furnish the cargo agreed upon in the said charter-party, except as set forth in said notice, and denies that respondent has failed or refused to perform any of the conditions and agreements agreed by it upon in the said charter-party.

V.

With respect to averments of Article V of said libel, respondent denies that by reason of the said refusal, or of any cause, the libelants have been damaged in the amount of $30,000 or upwards, or any sum.

WHEREFORE, respondent prays that it be hence dismissed with its costs.

PILLSBURY, MADISON & SUTRO.

Proctors for Respondent. [26]

State of California,
City and County of San Francisco,—ss.

C. A. Blumer, being first duly sworn, deposes and says:

That he is the agent of Vacuum Oil Co., Proprietary, Ltd., the respondent named in the foregoing answer, and makes this verification on behalf of said respondent, because said respondent is a corporation, organized under the laws of the Commonwealth of Australia, and has no officer in the State of California, or there present; that he has personal knowledge of the facts stated in said answer; that he has read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge except as to those matters which are therein stated on information or belief, and that as to those matters he believes it to be true.

C. A. BLUMER.

Subscribed and sworn to before me this 7th day of February, 1920.

[Seal] W. H. PYBURN,
Notary Public in and for the City and County of San Francisco, State of California. [27]

Exhibit "A."

C. A. BLUMER,
Room 741,
Mills Building.
San Francisco, October 11th, 1919.

Sanders & Kirchmann, Inc.,
212 American National Bank Bldg.,
San Francisco, California.

Gentlemen:

Schooner "COMMERCE."

As this vessel has not given notice of readiness to load to the undersigned, and as the 110th day since the vessel sailed from Suva, a South Sea Island Port, expired on October 6th, 1919, the undersigned hereby gives you this notice that it hereby exercises its option to cancel and hereby cancels the Charter covered by charter-party dated the 19th of November, 1918, between yourselves and the undersigned.

Yours truly,
VACUUM OIL COMPANY, PTY., LTD.
By C. A. BLUMER,
Agent.

CAB/J.

Receipt of a copy of the within answer is hereby acknowledged this 7th day of February, 1920.

WILLIAM DENMAN,
Proctor for Libelants.

[Endorsed]: Filed Feb. 7, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [28]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Thursday, the twenty-first day of April, in the year of our Lord, one thousand nine hundred and twenty-one. Present: The Honorable JEREMIAH NETERER, Judge.

No. 16,701.

SAN MATEO REALTY & SEC. CO., etc.,

vs.

VACUUM OIL CO., etc.

Minutes of Court—April 21, 1921—Trial.

This cause came on regularly this day for hearing of issues. E. B. McClanahan, Esq., was present as proctor for and on behalf of libelant. Alfred Sutro, Esq., was present as proctor for and on behalf of respondent. Mr. McClanahan made statement to the Court as to the nature of the cause, and called A. E. Wolff and Henry Kirchman, Jr., each of whom was duly sworn as a witness on behalf of libelant, and introduced in evidence certain exhibits, which were filed and marked Libelant's Exhibits Nos. 1 and 14 (Charter-party), 2 to 13, inclusive (letters). After hearing respective proctors, the Court ordered that the further hearing of this cause be, and the same is hereby continued to April 22, 1921, at 2 o'clock P. M. [29]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the court room thereof, in the City and County of San Francisco, State of California, on Friday, the twenty-second day of April, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable JEREMIAH NETERER, Judge.

No. 16,701.

SAN MATEO REALTY & SECURITY COMPANY, etc.,

vs.

VACUUM OIL CO., etc.

Minutes of Court—April 22, 1921—Trial (Continued).

This cause came on regularly this day for further hearing of the issues. E. B. McClanahan, Esq., was present as proctor for and on behalf of libelant. Alfred Sutro, Esq., was present as proctor for and on behalf of respondent. Henry Kirchmann resumed the stand and was further examined. Mr. McClanahan introduced in evidence the depositions of Alexander Beattie and Charles Anderson, and also introduced in evidence certain exhibits, which were filed and marked Libelant's Exhibits 15 (letter), 16 (letter, etc.), 17 (bills of lading), 18 and 19 (typewritten memo), and thereupon rested cause of libelant. Mr. Sutro called A. D. Jones, C. M. Connolly, C. A. Blumer, John B. Blair and R. N.

Singerland, each of whom was duly sworn as a witness on behalf of respondent, and examined, and introduced in evidence certain exhibits which were filed and marked Respondent's Exhibits "A," "B," "C," "D," "E," "F," "G" (letters), "H" (telegram), "I," "J," "K" (letters), and "L" (stipulation), and thereupon rested cause on behalf of respondent. Mr. McClanahan recalled in rebuttal A. E. Wolff and Henry Kirchman, who were further examined. After hearing proctors for respective parties, the Court ordered cause submitted on briefs to be filed in 5 and 5 and 3 days. [30]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,701.

Before Hon. JEREMIAH NETERER, Judge.

SAN MATEO REALTY CO.,

Libelant,

vs.

VACUUM OIL CO., P'T'Y, LTD.,

Respondent.

(Testimony Taken in Open Court.)

THURSDAY, APRIL 21, 1921.

Counsel Appearing:

For the Libelant: Messrs. McCLANAHAN & DERBY, Represented by Mr. McCLANAHAN,
For the Respondent: ALFRED SUTRO, Esq.

OPENING STATEMENT FOR THE LIBELANT.

Mr. McCLANAHAN.—If the Court please, this is an admiralty proceeding for damages for breach of charter-party in the failure of the charterer to provide for the chartered vessel a cargo under the charter-party.

We propose to show that the charter in question was negotiated for through the Standard Oil Company, representing the charterer. The negotiations were concluded here, we propose to show, and the charter made out and forwarded East, I believe to New York, I believe for the signature of the respondent, who is the charterer, the Vacuum Oil Company.

The charter was dated November 18, 1918, and was sent on [31] in its concluded form as the result of the negotiations, to New York, there signed, and returned here. It was a charter for a cargo of case oil, and lumber on deck, the case oil being in the hold.

I wish to state briefly, for the Court's assistance, the relative provisions of the charter-party.

The owner engages, first, to furnish the vessel, a vessel named the "Commerce," a sailing vessel, a schooner.

The first clause of the charter-party provides for an engagement by the charterer to provide and furnish a cargo for that vessel, a cargo of case oil, or petroleum products, as that particular clause reads, and lumber on deck.

The second clause provides for the charter rate.

The next relevant clause is the fourth, and it provides, among other things, that no goods are to be laden on board the "Commerce" except from the charterer, or from charterer's agents.

The next clause provides that there shall be designated by the charterer, or by the charterer's agents, the loading berth for the vessel.

The next relevant clause provides that the lay-days are to commence when the vessel is ready to receive cargo.

The next relevant clause provides that the loading lay-days are to commence when the vessel is ready to load.

And then it goes on to say, in this particular clause, that the vessel has 110 days in sailing from a South Sea Island port to reach San Francisco, and there give notice; that is to say, she has 110 days before the charterer has the right to cancel the charter; and if she exceeds the 110 days, the charterer has the right to cancel the charter; if and when he decides to do so, it must be done when the notice of readiness is given.

Right here I will say that that is the only specific

reference in [32] the charter-party to this notice of readiness to receive cargo—in that particular clause, the cancellation clause of the charter-party.

The next clause provides that the cargo shall be received and delivered alongside at loading berth within reach of the vessel's tackles.

The next relevant clause provides that the vessel's stevedores are, for the loading and the discharging, to be appointed by the master.

We intend to prove that the vessel left a South Sea Island port, Levuka, the city or town of Levuka, in the Fiji Islands, on the 16th, or on the 19th of June, I believe it is. Have we a stipulation on that?

Mr. SUTRO.—The 19th of June.

Mr. McCLANAHAN.—That she left Levuka on the 19th of June, 1919, for San Francisco, for this port; that she arrived here some time in August and was immediately after discharging her inward cargo placed in dry-dock for repairs, and that during the period after her arrival here, numerous inquiries were made by the Standard Oil Company, through Mr. Slingerland, who was the agent of the Standard Oil Company, who negotiated the charter for the Vacuum Oil Company—numerous inquiries, I say, were made by him as to when the vessel would be ready for loading. That finally the vessel was ready for loading, and on the 16th of September, 1919, she having already been advised of the designated loading berth by Mr. Slingerland, or the Standard Oil Company, as being Port Orient, a loading point on this Bay, I think, under the con-

trol of the Standard Oil Company; the vessel proceeded to that designated loading point on the 16th day of September, and having arrived there was berthed under the direction of the [33] agents of the Standard Oil Company there present, and gave notice—verbal notice—of her readiness to receive cargo.

We expect to prove that, as a matter of fact, she was ready to receive cargo.

We expect to prove that this notice of readiness to receive cargo was also given to another employee of the Standard Oil Company, at Point Orient, a man named Jones, who is the reputed superintendent of the Standard Oil Company's business at Point Orient.

We expect to prove that on the same day, in the city of San Francisco, verbal notice of the vessel's having been sent to Point Orient, and of her readiness to receive cargo, was also given to a man named Blumer, who since the making of the charter-party appears upon the scene as an agent—the local agent of the Vacuum Oil Company.

We intend to prove that the vessel waited there for her cargo at Point Orient, and received no cargo, although it was known that that was the point where the cargo was to be received, where it actually was, though it was not received or designated to the vessel at all.

It was on the 16th of September that the vessel first went there and gave this notice of her readiness; she waited there, and on the 11th of October received from this man Blumer, who pur-

ported to be the agent of the Vacuum Oil Company, the charterer, a notice of cancellation of the charter for failure on the part of the owner to give notice of readiness to load.

We expect to prove that after the making of this charter there was a very radical and an alarming falling off in charter rates, and that after we had received the notice of cancellation, we approached the agent of the respondent, the Vacuum Oil Company, with offers to allow him to assist us in minimizing our [34] damages and securing another cargo. That as the result of negotiations, we finally did secure another charter from the Vacuum Oil Company at the then prevailing charter rates, which were a great many per cent lower than the charter rates which were attempted to be cancelled.

I think that is our case, and I will call as the first witness—

Mr. SUTRO.—Are you claiming for your damages the difference between the charter rates?

Mr. McCLANAHAN.—We claim as damages the difference between the charter of November 19, 1918, the first charter negotiated with the Standard Oil Company, and the charter which we later secured from the same charterer, on the 1st of November, 1919.

We will prove that the rate on November 1, 1919, was the then going market rate, and the highest rate at which we could charter our vessel.

The charter which we made as the second charter-party which the same charter was for the identical

class of goods, for the identical voyage, and the charter in all respects reads as the first charter-party which was attempted to be cancelled reads.

I will first call Mr. Wolff.

Testimony of A. E. Wolff, for Libelant.

A. E. WOLFF, called for the libelant, sworn.

Mr. McCLANAHAN.—Q. Mr. Wolff, you are a resident of San Francisco, are you? A. Yes, sir.

Q. What is your business?

A. Importer and exporter.

Q. How long have you been engaged in that business? A. About eighteen years.

Q. Have you had any experience in the matter of charters? [35]

A. Yes, sir.

Q. What has been your experience in that line?

A. In Pacific Ocean chartering practically during the last 12 or 14 years, almost continuously.

Q. What class of charters have you principally negotiated?

A. Full cargoes, both steamer and sailing vessel, including lumber, and copra, and case oil.

Q. Have you had any dealings, during your business experience, with the firm of Sanders & Kirchmann, Inc.? A. Yes, sir.

Q. That is a corporation here doing a shipping business, with Australia and South Sea Island ports, largely?

A. They are ship owners.

Q. And they are owners of various sailing vessels? A. They are the agents for owners.

(Testimony of A. E. Wolff.)

Q. Agents for owners of various sailing vessels?

A. Yes, sir.

Q. You are not interested in Sanders & Kirchmann, are you? A. Not at all.

Q. How long have you done business with them as a broker in the chartering of their vessels?

A. Sometimes as broker and sometimes as charter, for the last six or seven years.

Q. Were you, in the month of November, in the year 1918, familiar with the charter rates for schooners, sailing vessels, in cargo lots, between this port and the South Sea Islands and Australia?

A. Yes, sir.

Q. In that month and in that year, did you negotiate a charter with anyone for Sanders & Kirchmann as the managing owners?

A. Yes, several.

Q. Do you know the schooner "Commerce"?

A. I do.

Q. Did you negotiate a charter for that vessel during that month for that corporation?

A. I did.

Q. With whom did you conduct your negotiations for that charter? [36]

A. The Standard Oil Company, Mr. Slingerland.

Q. Who is Mr. Slingerland, with reference to the Standard Oil Company?

A. I think his title at that time was Assistant Traffic Manager; I am not entirely sure, but I think that was the title.

(Testimony of A. E. Wolff.)

Q. At that time, had you had any business with Mr. Slingerland—I mean, before that?

A. Yes.

Q. In what line of business?

A. A similar line, chartering.

Q. Had you at that time made charters for Sanders & Kirchmann with Mr. Slingerland?

A. Yes, sir.

Q. Who did Mr. Slingerland act for?

A. For the Vacuum Oil Company.

Q. Were all of the negotiations for this charter of the "Commerce" at this time made with Mr. Slingerland?

A. Yes, sir, they were made with Mr. Slingerland.

Q. Tell the history of the making of that charter, please.

A. I would talk to Mr. Slingerland, either in his office or on change, as to his requirements, and as to what the company wanted, and he expressed a desire to get the Sanders & Kirchmann ships at that time, because there was pretty keen competition for them; we gave him the ships to work on—I think we gave the refusal in writing, if I remember, in a letter addressed to the Standard Oil Company, and Mr. Slingerland wired or cabled the offer, and later on accepted the offer, either by signing a copy of our letter or by writing us a letter.

Q. What do you mean by giving Mr. Slingerland the ships to work on?

(Testimony of A. E. Wolff.)

A. By giving him a firm offer of the ships. I am not entirely sure, but I think we gave him a firm offer, or we indicated that we would receive a firm offer from him; I think we gave him a firm offer. Later on, when the charters were drawn, [37] as is customary, on the Vacuum Oil Company's blanks, signed by the owners here in accordance with the terms of the negotiations, and then sent on to New York for signature.

Q. Were these firm offers, which were either given by him or given by you, such as contained all of the terms of the charter?

A. Yes, sir.

Q. The principal terms?

A. The principal terms.

Q. And upon acceptance of the firm offer, the charter was then made out, as I understand you?

A. Yes, sir.

Q. And signed here first?

A. Signed by the owners here first, and by the Vacuum Oil Company's agent in New York.

Mr. SUTRO.—Just a moment. I have not objected to this line of examination at all, but it seems to me it is going a little too far. The only charter before the Court is the charter that is mentioned in the pleadings. The execution of that charter is admitted. I don't see the value of all of this historical data; it is unnecessarily prolonging the examination of the witness.

(Testimony of A. E. Wolff.)

Mr. McCLANAHAN.—Is there any particular question that you object to?

Mr. SUTRO.—Yes, I object to this as immaterial, irrelevant and incompetent, and that the charter speaks for itself.

Mr. McCLANAHAN.—To what question do you object?

Mr. SUTRO.—You asked him how it was made, and he said it was signed by the owners. As a matter of fact, it was not signed by the owners, it is signed by Sanders & Kirchmann.

The COURT.—If the execution is admitted, I think that is all that is necessary.

Mr. SUTRO.—Yes, that is all that is necessary.

Mr. McCLANAHAN.—But the question has been answered, your Honor. [38]

The COURT.—The answer may stand.

Mr. McCLANAHAN.—Q. Mr. Wolff, can you identify the document which I now hand you?

A. Yes, sir.

Q. What is it?

A. That is the charter for the schooner "Commerce," negotiated November 19, 1918.

Q. That is the charter that you have been speaking of as having been negotiated by you?

A. Yes, sir.

The COURT.—Is that to be introduced in evidence as an exhibit?

Mr. McCLANAHAN.—Yes, your Honor.

The COURT.—I suppose it will be marked Exhibit 1.

(Testimony of A. E. Wolff.)

Mr. SUTRO.—I have not seen it yet.

Mr McCLANAHAN.—Here it is. We offer the charter identified by the witness in evidence, and ask that it be marked Libelant's Exhibit 1.

The COURT.—All right, let it be admitted.

(The document was here marked Libelant's Exhibit 1.)

Mr. McCLANAHAN.—Q. At the time of the execution of this charter, was the schooner "Commerce" at this port?

A. I could not say.

Q. Do you know of the voyage that brought her to this port, prior to her readiness to enter upon the charter in question?

A. Yes, sir.

Q. From what port did she sail on that voyage?

A. She sailed from Levuka, Fiji Islands.

Q. Do you know of her arrival at this port on that voyage?

A. Not from memory; I would have to refresh my memory on it.

Q. I say, you know the fact that she did arrive?

A. Yes, sir.

Q. Do you know what she did after she arrived?

A. She discharged the inward cargo, which was to my firm, and then she went to the shipyards for repairs. [39]

Q. After her arrival here, and prior to her readiness to undertake the charter in question, did you have any conversation or communication, oral or

(Testimony of A. E. Wolff.)

otherwise, with Mr. Slingerland, with reference to the schooner "Commerce"?

A. Yes, I was seeing Mr. Slingerland every day, or every few days at the outside during that period, usually on 'Change, and sometimes talking over the phone with him; he was asking us right along when the "Commerce" would be ready, what was doing on her.

Q. Ready for what?

A. Ready to go up to load under the case oil charter.

Q. Do you know who designated the loading port for the "Commerce" under this charter?

A. I don't know. That would be handled by Sanders & Kirchmann.

Mr. SUTRO.—Q. You say you don't know?

A. No.

Mr. McCLANAHAN.—He has answered the question. Why are you stopping him?

Mr. SUTRO.—If your Honor will just hear that whole answer, you will see. He says: "No, that would be handled by so and so"; that part of the answer is not responsive. I had this witness before, your Honor, and not so very long ago, either, and he is very—

Mr. McCLANAHAN.—Now, Mr. Sutro, that is highly improper.

The COURT.—Proceed.

Mr. McCLANAHAN.—Q. Did you know the berth that was designated for the loading?

(Testimony of A. E. Wolff.)

A. Yes, sir.

Q. Where? A. Port Orient.

Q. Where is port Orient?

A. In the upper part of San Francisco Bay.

Q. What is it?

A. It is the loading place at which the Standard Oil Company ships most of their case oil cargo offshore [40]

Q. Had you had other vessels that you had negotiated the charters for ship from that point?

A. Yes, sir.

Q. Do you know the date that the vessel proceeded to that designated point of loading?

A. September 16, 1919.

Q. What other ports or points are there where case oil is furnished vessels by the Standard Oil Company for Vacuum Oil shipments?

A. Point Orient is the usual point. At times I think they have lightened it down to San Francisco wharves, or Oakland wharves; once, many years ago, they delivered it to us at Oakland Long Wharf, and I think once at Point San Pablo.

Q. When this charter was negotiated, did you know who was to be the furnisher of the cargo for the vessel? A. Yes, sir.

Q. Who? A. The Standard Oil Company.

Q. I understand that this was one of a number of charters similar to this that you negotiated with the Standard Oil Company? A. Yes, sir.

Q. Who in each case was the furnisher of the cargo? A. The Standard Oil Company.

(Testimony of A. E. Wolff.)

Q. When this charter was originally and first broached and the negotiations were first commenced, did you know then that it was ultimately to be a charter for the Vacuum Oil Company?

A. Yes, sir.

Q. At the time of the negotiations for this charter, and the making of the charter, did the Vacuum Oil Company, to your knowledge, have any other agent, other than the Standard Oil Company, here in San Francisco?

A. Not to my knowledge.

Q. Did you ever deal with any other agent than the Standard Oil Company? A. No, sir.

Q. What was the prevailing market rate for lumber in cargo lots on sailing vessels in November, 1918, from this port to Auckland, as a discharging port, and/or Wellington, and/or Lyttleton, and/or [41] Dunedin, Australia, with the option of one port to the charter?

A. You mean at the time this charter was negotiated, do you, in November, 1918?

Q. Yes, in November, 1918.

A. The prevailing rate for the deck cargo of lumber, taken on the deck of the schooner carrying case oil, for future loading, was $27.50.

Q. Per thousand feet?

A. Per thousand feet.

Q. Board measure? A. Board measure.

Q. And what was the prevailing market rate for case oil to be loaded below deck?

A. $1.375 per case.

(Testimony of A. E. Wolff.)

Q. So that the charter rates were the prevailing market rates? A. Yes, sir.

Q. Do you know, Mr. Wolff, the prevailing market rate for lumber on charters of that character in November, 1919, one year after?

A. During the whole of those three months—I don't know that I could say November specifically, I think the last charter I had knowledge of was probably in October; about $15 per thousand feet, in October, 1919.

Q. For lumber? A. For lumber, yes.

Q. And what was the prevailing market rate for case oil? A. 70 cents.

Q. 70 cents? A. Yes, at that same time.

Q. Did you have anything to do with the second charter of the "Commerce"? A. No, sir.

Q. Between the consummation of the charter of November 19, 1918, with the Standard Oil Company, for the Vacuum Oil Company, and the 16th of September, 1919, what was the condition of the freight market?

A. It was downward, very sharply downward.

Q. Had that condition developed suddenly, or was it a gradual condition?

A. It was the outcome of the shipping situation [42] after the armistice; it came on slowly at first, but got very rapid later on.

Mr. McCLANAHAN.—You may take the witness.

(Testimony of A. E. Wolff.)

Cross-examination.

Mr. SUTRO.—Q. Mr. Wolff, your talks and your negotiations with Mr. Slingerland were, I understand, so far as you are concerned, as the representative of Sanders & Kirchmann, Inc.?

A. As a broker.

Q. As a broker of Sanders & Kirchmann, you were representing them, were you not?

A. I presume so, but that question didn't enter my mind.

Q. Well, it does now, as I ask it? A. Yes.

Q. You say that you made an offer to Mr. Slingerland of this charter; the offer was made by you to Mr. Slingerland for the Vacuum Oil Company, wasn't it?

A. It was made to the Standard Oil Company for submission by them to the Vacuum Oil Company.

Q. Didn't you say your dealings were with Mr. Slingerland? A. Yes, sir.

Q. You had no dealings with anyone else connected with the Standard Oil Company, did you?

A. No, but our letters were addressed—

Q. I didn't ask you that: I asked you did you have any dealings with anybody else except Mr. Slingerland?

A. At times; sometimes I talked with Mr. Slingerland's assistant, and once with his superior, Mr. Casad.

Q. Did you have any communications with any-

(Testimony of A. E. Wolff.)

body else other than Mr. Slingerland concerning this charter?

A. I could not say concerning this charter; at one time I did, when Mr. Slingerland was away.

Q. I am not asking you about other times, I am asking you about this charter.

A. I could not say positively. [43]

Q. Very well, if you cannot answer, that's all right. You say that Mr. Slingerland, in response to your offer of this charter to him, accepted the same in writing; Is that correct?

A. It is my memory that he accepted it in writing, either at the foot of one of our own letters, a duplicate, or on a letter which he wrote us; I would have to look up our records to be sure.

Q. You so testified on your direct examination, didn't you? I made a note of it. Did you so testify on your direct examination?

A. The record will show.

Q. What is your memory of your own examination?

A. My memory is I said I was not sure whether Mr. Slingerland had written us separately or had accepted on a duplicate of our letter.

Q. Your answer now is that in response to your offer you don't know whether Mr. Slingerland wrote you a letter, or whether he accepted it on a duplicate of your letter; that is your answer, is it?

A. Yes.

Mr. McCLANAHAN.—And that is my recollection of his testimony.

(Testimony of A. E. Wolff.)

Mr. SUTRO.—Very well, that is what I am asking him.

Q. Is that right? A. Yes, sir.

Q. And in writing to you, Mr. Slingerland was writing to you as the broker of Sanders & Kirchmann, Inc.? A. Yes, sir.

Q. You say that Mr. Slingerland was asking you right along when she would be ready, or when she would go to Point Orient, or what?

A. I don't know that he mentioned Point Orient, particularly. He was asking us when she would be ready to load her case oil.

Q. You say he was "asking us": Did he ask you?

A. He asked me, yes.

Q. He asked you? A. Yes, sir. [44]

Q. Had you told him that she was on the drydock?

A. I could not say whether I stated that; I could not say that positively.

Q. Do you recall how long before she went to Point Orient, as you testify, on September 16th, Mr. Slingerland asked you when she would be ready to take her case oil?

A. The discussion of that was more or less intermittent over a period of, I should say, two or three weeks.

Q. Do you know when she got here?

A. My memory is it was some time in August; I am not sure of the date.

Q. And he kept on asking you this up to the time

(Testimony of A. E. Wolff.)

that she went up to Point Orient on September 16th: Is that right?

A. Up to within a day or two of that time, when he gave orders.

Q. When he gave orders?

A. Well, when the Standard Oil Company gave orders.

Q. Now, first, let us get this right. It was up to within two or three days of September 16th that he kept asking you when she would be ready to take her case oil?

A. That is my approximate memory.

Q. Until he, or the Standard Oil Company, gave orders? A. Yes.

Q. Did he give you any orders?

A. Not to me; no, sir.

Q. Did the Standard Oil Company give you any orders? A. Not to me.

Q. Do you know when Mr. Slingerland gave any orders? A. I don't know whether he gave orders.

Q. Do you know whether anybody connected with the Standard Oil Company gave any orders?

A. I don't know, myself.

Q. Then why do you say that he kept on repeating until he or the Standard Oil Company gave orders?

A. Because when they were advised that the vessel was ready to go up, orders were given to the office—not to me—by the Standard Oil Company, and the office ordered the vessel towed up. That is why I said that. [45]

(Testimony of A. E. Wolff.)

Q. I just asked you a moment ago if you knew whether or not anybody connected with the Standard Oil Company gave any orders, and you said no, and now you state that somebody connected with the Standard Oil Company gave the office order.

A. Was that your question I don't recall it that way.

Mr. McCLANAHAN.—Do you deny that the Standard Oil Company gave the order?

Mr. SUTRO.—Now, Mr. McClanahan, I didn't interrupt your examination, and I don't care to have you interrupt mine. As I told you before, I have had experience with this witness.

Mr. McCLANAHAN.—That is very improper, Mr. Sutro.

Mr. SUTRO.—I know you say that, but the Court can judge for itself.

The COURT.—Proceed.

Mr. SUTRO.—Q. Did Mr. Slingerland give you any orders? A. No, sir.

Q. Did the Standard Oil Company give you or your concern any orders?

A. Not my concern; no, sir.

Q. To whom did it give any orders?

A. To Sanders & Kirchmann, the agents for the vessel.

Q. Were they written or verbal?

A. As far as I know, verbal.

Q. Who gave those orders?

A. I do not know.

Q. You don't know? A. No, sir.

(Testimony of A. E. Wolff.)

Q. To whom were they given?

A. I don't know that.

Q. Then how do you know any orders were given?

A. From the office procedure.

Q. What is that procedure?

A. A vessel, when she is chartered to load at one of two places, has to find out from the charterer where she is to go to lift the cargo; when she is ready, or nearly ready, the office procedure is to confer with the charterer's [46] representative and say that the vessel will be ready to go up on such and such a day; the charterer will then say, "I want to load her at such and such a place." Usually that is done verbally; sometimes over the telephone, sometimes by one man, sometimes by another. When the orders are given, the captain is notified by the office and told that when he is ready to go up he is to pick up a towboat—to find out if the berth is clear and then be towed up. That is the procedure. And we know, inasmuch as the vessel was towed up there, that orders were given.

Q. You know from prior procedure, do you, that orders were given in this case?

A. I am assuming from the procedure that orders were given in this case, otherwise the vessel would not have known where to go.

Q. Your conclusion is that unless orders had been given, the vessel would not know where to go: Is that it? A. That is it, in part.

Q. What office do you refer to, when you refer to "office procedure"?

(Testimony of A. E. Wolff.)

A. The procedure in the office of Sanders & Kirchmann, the owners of the vessel.

Q. Sanders & Kirchmann, Inc.? A. Yes, sir.

Q. You were familiar with the procedure in that office? A. Yes, sir.

Q. And you saw what was going on with relation to this vessel, didn't you? A. In part.

Q. In part?

A. Yes, in part; not altogether.

Q. Not altogether. Well, that is a cautious answer. Now, you testified that you knew that the berth this vessel was to go to was designated; who designated the berth? A. That I don't know.

Q. Then you don't know that the berth was designated?

Mr. McCLANAHAN.—That is a matter he has been testifying [47] about, and I submit—

Mr. SUTRO.—Now, never mind, Mr. McClanahan.

A. Mr. Sutro, I think—

Mr. SUTRO.—Q. I ask you the question now, you don't know that the berth was designated, do you?

Mr. McCLANAHAN.—I object to that, because it is the very matter the witness and counsel went through just immediately preceding this.

The COURT.—I thought he had given you what he knew about it. You may answer it again.

Mr. SUTRO.—Very well, if your Honor is satisfied with that.

The COURT.—I thought he gave you what he

(Testimony of A. E. Wolff.)

knew about it. He said he gave you what he knew about it—at least I have that in mind.

Mr. SUTRO.—He said that on his direct examination.

The COURT.—No, on yours. He gave you the procedure, what he knew about it.

Mr. SUTRO.—Q. As I understand your testimony now, it is that you don't know that the berth was designated, except by the inference you draw from the fact that she went up there: Is that right?

A. As far as my personal knowledge goes, yes.

Mr. SUTRO.—That is all.

Mr. McCLANAHAN.—No further questions.

Testimony of Henry Kirchmann Jr., for Libelant.

HENRY KIRCHMANN, Jr., called for the libelant, sworn.

Mr. McCLANAHAN.—Q. Your name is Henry Kirchmann?

A. Henry Kirchmann, Jr.

Q. You are an officer in Sanders & Kirchmann, Inc., are you? A. I am.

Q. And they are the managing owners of the schooner "Commerce"? [48] A. They are.

Q. And were the managing owners in November, 1918? A. They were.

Q. Who were the owners of the schooner "Commerce" in November, 1918?

Mr. SUTRO.—I object to that as not a competent question. The best evidence of who the owners were is the record at the customs-house.

(Testimony of Henry Kirchmann, Jr.)

The COURT.—Is this one of the owners?

Mr. McCLANAHAN.—Yes, your Honor.

The COURT.—If he is one of the owners, he may testify.

Mr. McCLANAHAN.—He is one of the officers of the corporation. I never heard before that you could not use verbal evidence to establish the ownership of a chattel.

Mr. SUTRO.—It is very much like the question of title to real estate, your Honor.

The COURT.—Well, is there any question about it? Is the question of title in issue? Is there any dispute about the title?

Mr. SUTRO.—I am not sure, your Honor. I understand there is some question about the title.

The COURT.—I will let him answer the question.

Mr. SUTRO.—I would like to ask him one or two questions preliminarily, or even two or three questions.

The COURT.—Proceed.

Mr. SUTRO.—Q. You say you are an officer of Sanders & Kirchmann, Inc.? A. Yes.

Q. What is your office? A. Vice-president.

Q. How long have you been vice-president?

A. For the last four or five years.

Q. Continuously? A. Continuously.

Mr. SUTRO.—All right.

The COURT.—You may answer who are the owners. [49]

A. Sanders & Kirchmann—

Mr. McCLANAHAN.—Q. Just let me interrupt

(Testimony of Henry Kirchmann, Jr.)

you: You are refreshing your memory, now, are you? A. Yes, sir.

Q. From what?

A. From a list of owners of the schooner "Commerce" as I received them from the customs-house, as of date November 19, 1918.

Q. And have you compared that list with the books of Sanders & Kirchmann, Inc., showing the owners of the "Commerce"? A. I have.

Q. Those books are in your office?

A. They are.

Q. And they do show the owners?

A. They do show the owners.

Q. The men to whom dividends are paid out of the earnings of the company? A. Yes, sir.

Mr. SUTRO.—If they are recited there, I will admit it.

Mr. McCLANAHAN.—Very well. We offer in evidence the certificate from the customs-house showing the owners. Later on in the case, if your Honor please, we propose to offer an amendment as to the owners, because the owners have changed; as your Honor knows, they change at one time and another.

(The document was here marked Libelant's Exhibit 2.)

Q. Do you know where the schooner "Commerce" sailed from on the voyage to this city, prior to undertaking the charter in question?

A. She sailed from Levuka, Fiji Islands, to San Francisco.

(Testimony of Henry Kirchmann, Jr.)

Q. When did she sail?

A. She sailed from Levuka about June 19th.

Q. And when did she get here?

A. She arrived in San Francisco on August 28th.

Q. Where did she go after arrival?

A. She discharged her inward cargo of copra, and then was placed on dry-dock for repair to be ready for this out-going voyage. [50]

Q. Do you know how long she was on dry-dock?

A. She was on dry-dock about two or three days. but there were other repairs which were done while she was in the water.

Q. Do you remember her going to the loading berth under this charter-party?

A. Yes, she went to the loading berth on September 16, 1919.

Q. Prior to her going to her loading berth, had you received a designation of that berth from anyone?

A. I had received a designation of the loading berth from the Standard Oil Company.

Q. What was the designation?

A. She was ordered to proceed to Point Orient, and load cargo.

Q. At what date was this order designating the loading berth?

A. It was either a day or two prior to her proceeding up there. The Standard Oil Company were phoning us from time to time, asking when the boat would be ready, and just prior to her going up

(Testimony of Henry Kirchmann, Jr.)

there they designated the berth where she was to proceed to, which was Point Orient.

Q. And she arrived at Point Orient, you say, on September 16th, 1919? A. Yes, sir.

Q. Do you know at that time whether she was ready to receive cargo, or not?

A. She was ready to receive cargo.

Q. Do you remember what may be designated as the second charter-party of the "Commerce," made with the Vacuum Oil Company, and dated November 1, 1919? A. I do.

Q. Between September 16, 1919, and the entering upon the second charter-party, was anything done to the schooner "Commerce" by way of making her ready to receive cargo?

A. Nothing was done, because she was ready on September 16th to receive cargo.

Q. And she remained in that condition until she was finally loaded under the second charter-party?

A. She did.

The COURT.—When was that done? Have you that date? [51]

Mr. McCLANAHAN.—When was that done?

The COURT.—The loading under the second charter.

Mr. McCLANAHAN.—Q. Do you know when she was loaded under the second charter-party? I have the bills of lading here, your Honor. November 15, 1919.

The WITNESS.—That is the date when loading was completed.

(Testimony of Henry Kirchmann, Jr.)

Q. What is that?

A. That would be the date when the loading was completed.

Q. Yes, that is the date of the bill of lading?

A. Yes.

Q. Did you, at the time of the making of the first charter-party, November 19, 1918, know of any other agent than the Standard Oil Company of the Vacuum Oil Company in San Francisco?

A. I did not.

Q. Subsequently to September 16, 1919, did you learn of any other agent?

A. I was not officially advised of any other agent, but there was a Mr. Blumer whom we understood was acting for the Vacuum Oil Company.

Q. A Mr. Blumer? A. A Mr. Blumer.

Q. Do you remember having any dealings with Mr. Blumer connected with the schooner "Commerce" on the date of September 16, 1919?

A. I called at the office of Mr. Blumer in the forenoon of September 16, 1919, accompanied by the captain of the steamer "Luzon," Captain Beatty, another one of our vessels which had just loaded a cargo for the Standard Oil Company; we went there on business of the "Luzon," and on arriving at that office Mr. Blumer asked me how the "Commerce" was getting along, and I advised Mr. Blumer that the "Commerce" had towed up the river that morning, and that she either was at the loading port or was on the way up.

Q. What else was said, if anything?

(Testimony of Henry Kirchmann, Jr.)

A. I asked Mr. Blumer if there was any further notice necessary, and he said no. Then we proceeded with the business of the schooner "Luzon." [52]

Q. Prior to that conversation with Mr. Blumer, had you had any other conversation with him with reference to the "Commerce"?

A. Yes, I had met Mr. Blumer on 'Change, and he had asked how the "Commerce" was getting along; that was while she was repairing.

Q. After this conversation of September 16, 1919, with Mr. Blumer, did you have occasion to see Mr. Blumer again before he cancelled or attempted to cancel this charter-party?

A. No; between the time of September 16th and the date of the cancellation of the charter-party I did not see Mr. Blumer again.

Q. And had no communication with him?

A. Not during that time.

Q. Mr. Kirchmann, can you tell the Court the best of your recollection as to where, and when, and how, and by whom you were advised of Mr. Blumer's connection with the Vacuum Oil Company?

A. I was negotiating several charters at that time, a good *man* of them through Mr. Wolff, for shipping friends of mine, with the Standard Oil Company, and when I would call I would always call on Mr. Slingerland, and at times he would designate for me to go to somebody else; at one time he told me to see a Mr. Blumer in the Mills Building, and

(Testimony of Henry Kirchmann, Jr.)

so I went and saw Mr. Blumer in the Mills Building.

Q. Did you find his office there?

A. I found his office there. On the door was only the name C. A. Blumer.

Q. Did you from Mr. Slingerland learn at that time that he was representing the Vacuum Oil Company? A. I did not.

Mr. SUTRO.—Who do you mean? Learn that who was representing the Vacuum Oil Company?

Mr. McCLANAHAN.—Mr. Blumer.

Q. Do you know whether Mr. Blumer knew of the arrival of the "Commerce" in San Francisco on her inward voyage?

A. I do not know whether he knew of her arrival, but he knew that she was [53] there prior to the time that she proceeded up to Point Orient, because he would ask me at times how the "Commerce" was getting along.

Q. Do you know whether Mr. Slingerland knew of her arrival here on the inward voyage?

A. I do not know whether Mr. Slingerland knew of her arrival here, but I know that he knew she was here, because he would ask me how she was getting along.

Q. How did you receive the designation of the loading port under the charter-party?

A. The Standard Oil Company telephoned over the telephone to proceed to Point Orient to load.

Q. Do you know who it was who telephoned?

A. I do not know who it was that telephoned, but

(Testimony of Henry Kirchmann, Jr.)
we had that conversation with various officers of the Standard Oil Company from time to time.

Q. I believe you testified that that was a few days before September 16th.

A. It was a few days before September 16th.

Q. Was this the first dealing that you had had with the Standard Oil Company in which it represented as agent the Vacuum Oil Company?

A. No, we had many other charters made that way with the Standard Oil Company; in fact, I think we negotiated something like—we had over ten charter parties of our own with the Standard Oil Company, that is, the negotiations would be made with the Standard Oil Company, and the charter-party would be drawn in the name of the Vacuum Oil Company, and it would be necessary each time to have those charters forwarded to New York for signature.

Q. Was the procedure in the case of the "Commerce" different from the procedure in the case of other charters?

A. It was the same in every case, with the exception of the second charter, which took the place of the cancelled charter; in that case, the charter was signed here by Mr. Blumer. [54]

Q. Mr. Kirchmann, did your firm or corporation receive notice of the cancellation of the first charter from anyone? A. Yes.

Q. Mr. Kirchmann, after this vessel had been repaired, do you know whether she was certified, or not?

(Testimony of Henry Kirchmann, Jr.)

A. She was certified by a surveyor from the San Francisco Board of Marine Underwriters.

Q. What did you do with that survey?

Mr. SUTRO.—If your Honor please, I think that is entirely immaterial. There is no question here about the vessel's seaworthiness; it is just encumbering the record.

The COURT.—If there is no question about it, then that might be taken as established.

Mr. McCLANAHAN.—Is there any question about the fitness of the vessel to receive this cargo?

Mr. SUTRO.—No, there is no question about it.

Mr. McCLANAHAN.—Then it is admitted that the vessel was fit to receive this cargo. Will you admit that you had notice of that fitness?

Mr. SUTRO.—We will admit there was a surveyor's certificate, certifying to the seaworthiness of the vessel.

Mr. McCLANAHAN.—That is not far enough, because this certificate is a certificate of her fitness to receive this cargo for this voyage, and we want an admission that that notice was received by the respondent.

Mr. SUTRO.—We will admit that there was a certificate from a surveyor that the vessel was in good condition throughout, and in every respect fit to carry dry and perishable cargo upon the voyage intended.

Mr. McCLANAHAN.—And that the intended voyage was the voyage under this charter-party?

Mr. SUTRO.—Yes.

(Testimony of Henry Kirchmann, Jr.)

Mr. McCLANAHAN.—And that you received notice of that fact? [55]

Mr. SUTRO.—And that we received notice of that fact, yes.

Mr. McCLANAHAN.—Q. I will ask you, Mr. Kirchmann, if you can recognize this document which I hand you?

A. Yes.

Mr. McCLANAHAN.—I will offer this in evidence, and ask that it be marked Libelant's Exhibit 3. I desire to read these letters into the record. It reads as follows:

Libelant's Exhibit No. 3.

(Letter-head of C. A. Blumer, Room 741 Mills Building.)

"San Francisco, October 11th, 1919.

Sanders & Kirchmann, Inc.,
212 American National Bank Bldg.,
San Francisco, California.

Gentlemen:

Schooner 'COMMERCE.'

As this vessel has not given notice of readiness to load to the undersigned, and as the 110th day since the vessel sailed from Suva, a South Sea Island Port, expired on October 6th, 1919, the undersigned hereby gives you this notice that it hereby exercises its option to cancel and hereby cancels the Charter covered by Charter Party dated the 19th of Novem-

(Testimony of Henry Kirchmann, Jr.)

ber, 1918, between yourselves and the undersigned.

Yours truly,

VACUUM OIL COMPANY, PTY., LTD.

By C. A. BLUMER,

Agent."

(The document was marked Libelant's Exhibit 3.)

Mr. McCLANAHAN.—Mr. Sutro, will you please produce the answer to that letter?

Mr. SUTRO.—Yes.

Mr. McCLANAHAN.—Q. Was there a reply made to that letter, Mr. Kirchmann?

A. A reply was made to that letter.

Q. By Sanders & Kirchmann?

A. By Sanders & Kirchmann.

Mr. SUTRO.—Let me see your copy.

Mr. McCLANAHAN.—It is admitted, if your Honor please, that [56] this was the answer. I will ask that it be marked Libelant's Exhibit 4. It is dated October 11, 1919.

Mr. SUTRO.—It may be more satisfactory to have the original; here is the original.

Mr. McCLANAHAN.—All right. I will read from the original just handed to me by counsel. It reads as follows:

(Testimony of Henry Kirchmann, Jr.)

Libelant's Exhibit No. 4.

(Letter-head of Sanders & Kirchmann, Inc., 212 to 216 American National Bank Building.)

San Francisco, Cal., Oct. 11th, 1919.

Vacuum Oil Company, Pty., Ltd.,
C. A. Blumer, Agent,
Room 741 Mills Building,
San Francisco, Cal.

Dear Sirs:—

Schr. 'COMMERCE.'

We are puzzeled to understand your letter of even date. It was evidently written under a misapprehension that you can require notice of readiness to be tendered to you in writing. The fact is that we notified you that the vessel was ready in berth—at the berth designated by you—almost immediately after her arrival there and long before the 110th day after she sailed from Suva. It seems evident that your letter was written under the misapprehension that the charter required us to give written notice.

Under the circumstances we cannot accept your notice of cancellation of the charter.

Yours truly,
SANDERS & KIRCHMANN, INC.
By H. KIRCHMANN,
Secretary."

(The letter was marked Libelant's Exhibit 4.)

Mr. SUTRO.—I would like to ask the witness a question.

Q. Is that the letter that Sanders & Kirchmann sent?

(Testimony of Henry Kirchmann, Jr.)

A. That is the letter Sanders & Kirchmann sent in reply to the letter that they received from Blumer.

Mr. McCLANAHAN.—Q. And did you get a reply to that letter? [57]

A. We received no reply to that letter that I recollect.

Q. Well, I hand you a document and ask you if you can refresh your recollection from it.

A. Yes.

Q. So you did receive a reply?

A. Yes, we did receive a reply.

Q. What is the document that I hand you?

A. This is a letter from C. A. Blumer, under date of October 14, 1919.

Q. Replying to yours of the 11th of October?

A. Replying to ours of the 11th of October.

Mr. McCLANAHAN.—I offer this in evidence and ask that it be marked Libelant's Exhibit 5. It is dated October 14, 1919. It reads as follows:

Libelant's Exhibit No. 5.

(Letter-head of C. A. Blumer.)

"San Francisco, October 14th, 1919.

Messrs. Sanders & Kirchmann, Inc.,
212 American National Bank Building,
San Francisco, Calif.

Dear Sirs:—

Schooner 'COMMERCE.'

Your letter, dated the 11th inst., was evidently left at the office of the undersigned yesterday, a legal holiday.

(Testimony of Henry Kirchmann, Jr.)

Our letter of the 11th to you, cancelling the charter for this vessel, dated November 19, 1918, was not written under any misapprehension. We note that you say that,

> 'The fact is that we notified you that the vessel was ready in berth—at the berth designated by you—almost immediately after her arrival there and long before the 110th day after she sailed from Suva.'

So far as the writer of this letter is concerned, he knows of no notice, either oral or written, that was given by you, or any one else, to the undersigned, or to anyone on its behalf, of the readiness of this vessel to load. Will you kindly let us know who, on your behalf, gave notice of readiness and on what date and to whom the same was given, and also let us have a copy of the [58] notice or of its contents.

Yours truly,
VACUUM OIL COMPANY, PTY., LTD.,
By C. A. BLUMER,
Agent."

(The document was marked Libelant's Exhibit 5.)

Q. Did you answer that letter?

A. Yes, that letter was also answered.

Q. Is that the answer to the letter just read, the letter which I now hand you? A. Yes, sir.

Mr. McCLANAHAN.—I offer this in evidence. It is on the letter-head of Sanders & Kirchmann, Inc. And dated October 15, 1919, and reads as follows: We ask that it be marked Libelant's Exhibit 6.

(Testimony of Henry Kirchmann, Jr.)

Libelant's Exhibit No. 6.

(Letter-head of Sanders & Kirchmann, Inc.)

"San Francisco, Cal., Oct. 15th, 1919.

Vacuum Oil Company, Pty., Ltd.,
C. A. Blumer, Agent,
Room 741 Mills Building,
San Francisco, Cal.

Dear Sir:

Schooner 'COMMERCE.'

We acknowledge receipt of your letter of Oct. 14th. Immediately upon the vessel's arrival in berth, the Captain notified the man in charge, at designated dock, that the vessel had arrived and was ready to load and the man in charge came aboard, examined the holds and inspected the dunnage and found the vessel to be ready.

Yours truly,
SANDERS & KIRCHMANN, INC.
By H. KIRCHMANN,
Secretary."

(The document was marked Libelant's Exhibit 6.)

Q. Did you receive an answer to that letter?

A. I don't recollect.

Q. Just refresh your memory by looking at this.

A. Yes.

Mr. McCLANAHAN.—We offer in evidence the answer to the letter just read, and ask that it be marked Libelant's Exhibit [59] and it reads as follows:

(Testimony of Henry Kirchmann, Jr.)

Libelant's Exhibit No. 7.

(Letter-head of C. A. Blumer.)

"San Francisco, October 15th, 1919.

Sanders & Kirchmann, Inc.,
212 American National Bank Bldg.,
San Francisco, Calif.

Gentlemen:—

Schooner 'COMMERCE.'

Your letter of today about the Schooner 'Commerce' is at hand. We do not understand to whom you refer as 'the man in charge' whom you state the Captain notified that the vessel had arrived and was ready to load. You give us neither date nor name.

We had no one at the berth you mention representing us or authorized to accept any notice for us, nor did anyone, so far as we know pretend to have accepted any notice from you, or from your Captain, on our behalf.

Yours truly,
VACUUM OIL COMPANY PTY., LTD.,
By C. A. BLUMER,
Agent."

(The document was marked Libelant's Exhibit 7.)

Q. Was that letter answered, Mr. Kirchmann?

A. My recollection is that that was answered.

Q. Do you identify this document that I hand you as the answer to that letter? A. Yes, sir.

Mr. McCLANAHAN.—I offer in evidence the letter identified by the witness, and ask that it be marked Libelant's Exhibit 8. It is on the letter-

(Testimony of Henry Kirchmann, Jr.)

head of Sanders & Kirchmann, Inc., reading as follows:

Libelant's Exhibit No. 8.

"San Francisco, Cal., October 17th, 1919.

Mr. C. A. Blumer,
Mills Building,
San Francisco.

Dear Sir:

We are much puzzled by the stand that you have taken regarding your attempt to cancel the charter of the Schooner [60] 'Commerce.' Can you give us your positive assurance that you had no agent of the Vacuum Oil Company at Point Orient, at any time prior to the elapse of the 110 days? This may vitally affect the position we will take regarding the cancellation.

Yours very truly,
SANDERS & KIRCHMANN, INC.
By H. KIRCHMANN,
Secretary."

(The letter was marked Libelant's Exhibit 8.)

Q. Did you get a reply to that letter, Mr. Kirchmann?

A. I am not sure; there were so many letters.

Q. Can you refresh your memory from this?

A. Yes, sir.

Q. This is the reply? A. That is the reply.

Mr. McCLANAHAN.—We offer in evidence the original reply identified by the witness, and ask that it be marked Libelant's Exhibit 9. It reads as follows:

(Testimony of Henry Kirchmann, Jr.)

Libelant's Exhibit No. 9.

(Letter-head of C. A. Blumer.)

"San Francisco, October 18th, 1919.

Sanders & Kirchmann, Inc.,
212 American National Bank Bldg.,
San Francisco, California.

Gentlemen:—

Schooner 'COMMERCE.'

Yours of yesterday concerning the Schooner 'Commerce' received as we were about to close our office for the day. We note that you do not give us any of the information for which we ask in our letter of the 15th.

For reply to your letter of yesterday we respectfully refer you to our letter of the 15th. We may add that we have, we think, clearly and definitely stated our position in the premises and we suggest that it is useless to continue this correspondence.

Yours truly,
VACUUM OIL COMPANY, PTY., LTD.,
By C. A. BLUMER,
Agent."

(The document was marked Libelant's Exhibit 9.)

Q. Is it your recollection that that ended the correspondence [61] with reference to the cancellation? A. I think so; I do not think there were any more letters.

Q. Subsequently, Mr. Kirchmann, did you have anything to do with Mr. Blumer about re-chartering the schooner "Commerce"?

(Testimony of Henry Kirchmann, Jr.)

A. We had a meeting in Mr. Sutro's office with Mr. Kirchmann, Sr., and Mr. Blumer, and myself.

Q. Mr. Kirchmann, Sr., is your father?

A. He is my father.

Q. When was that meeting held?

A. That meeting was a day or two prior to the second charter.

Q. And if the second charter is dated November 1, 1919, it was a day or two prior to that?

A. It was a day or two prior to that.

Q. Was it at that meeting the second charter, of November 1, 1919, was negotiated and agreed upon?

A. At that meeting, we were asked if we would accept another charter at a little higher than the going rate, provided we would cancel our libel against the Vacuum Oil Company, which we declined to do, and we left the office. We tried hard to get a charter from the Vacuum Oil Company, but we did not succeed in doing so at the time. We advised Mr. Sutro and Mr. Blumer that the best charter we could get would be a lumber cargo to Melbourne, at a $35 freight rate, from a Northern lumber port, which would make the difference in damages far greater than if we were given a case-oil charter. They refused to give us a charter at that time, and we left the office. As we were about to enter the elevator, Mr. Blumer came to us and said he would give us a charter at the going rate of freight. That is the outcome of the negotiation for the second charter.

(Testimony of Henry Kirchmann, Jr.)

Q. Prior to your leaving the office and being called back, had Mr. Blumer—

Mr. SUTRO.—I don't think he said he was called back. [62]

Mr. McCLANAHAN. — Q. (Continuing) — had Mr. Blumer made you an offer of any kind?

A. Yes, Mr. Blumer had made us an offer through Mr. Sutro of 75 cents per case if we would cancel our libel, and it was intimated to us at the time that they would even go a little higher if we would cancel our libel against the Vacuum Oil Company.

Q. What do you mean by cancelling your libel? Had the libel been filed at that time?

A. The libel had been filed at that time, yes.

Q. And you declined that 75-cent offer?

A. We declined that offer.

Q. I believe counsel corrected me; he said you were not called back to the office.

A. We were called back to the office.

Q. Were you familiar at that time with the current rate of freight in cargo lots between this port and Wellington, Auckland, Lyttleton, Dunedin, Australia? A. I was.

Q. What was the current rate for case oil stowed under deck?

A. The current rate for case oil stowed under deck was 70 cents a case.

Q. And what was the rate, in a charter carrying case oil and lumber, for the lumber carried on deck?

A. For lumber carried on deck, $15, a thousand.

Q. Board measure? A. Board measure.

(Testimony of Henry Kirchmann, Jr.)

Mr. McCLANAHAN.—I call for the production of the original letter dated October 29, 1919, addressed to C. A. Blumer, and signed Sanders & Kirchmann, Inc., under the topic "Schooner 'Commerce.'"

Mr. SUTRO.—Here it is.

Mr. McCLANAHAN.—Q. Mr. Kirchmann, I hand you this document which has just been produced by counsel—Mr. Sutro, it [63] was the letter of October 29th that I wanted. I may use this one later.

Mr. SUTRO.—I haven't got the original. I will give you a copy. I thought that was the one I gave you. That is a copy of it, isn't it? You have a copy there.

Mr. McCLANAHAN.—Yes, I am comparing them.

Q. I hand you a document and ask you if you can identify it; it is a copy. A. Yes.

Q. You have read that, have you?

A. I have read it.

Q. Does it refresh your memory about this offer?

A. It does.

Q. In what respect?

A. That Mr. Blumer made us an offer of 75 cents a case for the case oil on the schooner "Commerce," and $20 per thousand for the lumber, provided we would dismiss our libel standing against the Vacuum Oil Company.

Q. Was that offer made at the meeting?

A. No, this was made prior to the meeting.

(Testimony of Henry Kirchmann, Jr.)

Q. Prior to the meeting?

A. Prior to the meeting.

Q. I understood you to testify that the offer of 75 cents for the case oil was made at the meeting?

A. It was again made at the meeting.

Q. But it was made before that in writing, was it?

A. Yes, it was made before that.

Q. And this is the document? A. Yes, sir.

Mr. McCLANAHAN.—You have examined this, Mr. Sutro?

Mr. SUTRO.—Yes; it comes from my possession.

Mr. McCLANAHAN.—We offer this in evidence and ask that it be marked Libelant's Exhibit 10. It reads as follows:

Libelant's Exhibit No. 10.

SANDERS & KIRCHMANN, INC.

San Francisco, Cal., Oct. 29th, 1919.

C. A. Blumer,
Agent, Vacuum Oil Co., Prop., Ltd.,
Mills Building,
San Francisco. [64]

Dear Sir:

Schooner 'COMMERCE.'

You offered, over the 'phone yesterday, to give us a cargo of case oil and lumber for our Schooner 'Commerce,' offering to pay 75¢ per case freight on the case oil and $20.00 per M feet freight on the lumber, provided we would dismiss our libel suit against your Company. You stated that these rates

(Testimony of Henry Kirchmann, Jr.)

were well above present rates. Our reply was that we declined your offer.

We did, however, offer to accept the above rates without prejudice to any claim we had against you and not dismiss our libel suit.

It is our understanding that you had declined to accept our offer and this is to advise you, since you have refused to fulfill our charter with you and have further declined to offer us cargo for this vessel at current rates, without prejudice to our claim against you, that we are now going out in the open market to secure the best, possible business we can for this vessel, with the view to minimize our damages against you as much as possible.

Yours truly,
SANDERS & KIRCHMANN, INC.
By H. KIRCHMANN,
Secretary."

(The document was marked Libelant's Exhibit 10.)

Q. And it was after the sending of that letter that this meeting occurred at which the charter was offered you at 70 cents and $15 for the lumber, and you retained your rights under your suit?

A. Yes.

Mr. McCLANAHAN.—Will you produce the letter of October 31st, Mr. Sutro, the one you offered me a while ago and which, for the moment, I did not use?

Mr. SUTRO.—Yes.

(Testimony of Henry Kirchmann, Jr.)

Mr. McCLANAHAN.—Q. Can you identify the letter which I now hand you? A. Yes.

Q. What is it?

A. That is a letter written on October 31st to [65] C. A. Blumer, in reference to the schooner "Commerce."

Q. And in reference to the matter of the charter?

A. Yes.

Mr. McCLANAHAN.—I offer it in evidence and ask that it be marked Libelant's Exhibit 11. It reads as follows:

Libelant's Exhibit No. 11.

(Letter-head of Sanders & Kirchman, Inc.)

"San Francisco, Cal., Oct. 31st, 1919.

C. A. Blumer,
Agent for Vacuum Oil Co., Prop., Ltd.,
Mills Building,
San Francisco.

Dear Sir:

Schooner 'COMMERCE.'

As advised you in our favor of the 29th inst., we have gone into the market in an endeavor to secure the best, possible business for this vessel. We find that we are unable to secure a case oil cargo and the best business that we are able to secure is a cargo of redwood lumber, from Humboldt Bay to Melbourne, at $42.50 per M feet, less 2½%, lump sum based on average fir capacity of 850,000 feet. Freight to be prepaid, but vessel to provide marine and war risk insurance covering prepaid freight.

In estimating the difference in freight earnings between this voyage and the case oil charter with yourselves, under date of November 19th, 1918, an allowance of at least sixty days additional must be given the vessel, on account of the longer voyage, also expense and loss of time moving from San Francisco to Humboldt Bay, additional time loading lumber cargo against case oil cargo, which also applies at the discharging end and the difference in cost of loading and discharging lumber as against case oil.

If you will refer to our letter of Oct. 29th you will note that we offered to accept your offer of 75¢ per case on case oil and $20.00 per M feet on lumber, provided this would be done without prejudice to our claim against you for breach of charter and that we were not to dismiss our libel suit. It is our opinion [66] that your damages would be less if the vessel took such a cargo, in place of the lumber cargo, and we again repeat this offer to you, subject to your written acceptance prior to 3 P. M. this afternoon, and if you do not accept, this is to advise you that we will accept the redwood lumber charter above referred to, to Melbourne.

Yours truly,
SANDERS & KIRCHMANN, INC.
By H. KIRCHMANN,
Secretary."

(The document was marked Libelant's Exhibit 11.)

(Testimony of Henry Kirchmann, Jr.)

Q. Did you subsequently write to the agent of the Vacuum Oil Company with reference to this new charter? Look at that and refresh your memory. (Addressing counsel.) Mr. Sutro, will you please produce the letter of November 3d?

Mr. SUTRO.—Here it is.

A. Yes, we wrote this letter on November 3d.

Mr. McCLANAHAN.—We offer in evidence this letter identified by the witness, and ask that it be marked Libelant's Exhibit 12. It reads as follows:

Libelant's Exhibit No. 12.

(Letter-head of Sanders & Kirchmann, Inc.)

"San Francisco, Cal., Nov. 3rd, 1919.

C. A. Blumer,
Agent for Vacuum Oil Co., Prop., Ltd.,
Mills Building,
San Francisco.

Dear Sir:

Schooner 'COMMERCE.'

In accordance with our agreement, we hand you herewith proposed charter of the Schooner 'Commerce.' It is understood that this charter and the rates and terms herein agreed upon are in no way in substitution of your charter of November 19th, 1918, on the said vessel between Vacuum Oil Company and ourselves, or in prejudice of our rights under and for breach of the same. Will you kindly confirm our understanding in this regard in writing?

In consideration of the execution by you of the new charter [67] and your confirmation of this

(Testimony of Henry Kirchmann, Jr.)

letter, we agree to modify your charter of the Schooner 'Philippine,' dated November 19th, 1918, by allowing you as an optional port of discharge, under said charter, the port of Timaru, New Zealand.

Yours truly,
SANDERS & KIRCHMANN, INC.
By H. KIRCHMANN,
Secretary."

(The document was marked Libelant's Exhibit 12.)

Q. This letter was written after the meeting in Mr. Sutro's office, at which the charter was negotiated finally? A. Yes, sir.

Q. Did Mr. Blumer, as the agent of the Vacuum Company, give you the assurance which you asked for in that letter in writing?

A. I do not recollect, but a charter was drawn up.

Q. Just look at this letter and refresh your recollection. A. Yes, sir.

Mr. McCLANAHAN.—We offer in evidence this letter just identified by the witness, and ask that it be marked Libelant's Exhibit 13. It reads as follows:

(Testimony of Henry Kirchmann, Jr.)

Libelant's Exhibit No. 13.

(Letter-head of C. A. Blumer.)

"San Francisco, November 4th, 1919.

Sanders & Kirchmann, Inc.,
212 American National Bank Bldg.,
San Francisco, Calif.

Gentlemen:—

Schooner 'COMMERCE.'

We have yours of yesterday with proposed Charter of the 'Commerce' dated November 1st, 1919. The same is satisfactory and is not in substitution of the former Charter dated November 19th, 1918, and is without prejudice to any rights which you may have by reason of the alleged breach by us of the Charter of November 19th, 1918.

Yours truly,
VACUUM OIL COMPANY, PTY., LTD.
By C. A. BLUMER,
Agent."

(The document was marked Libelant's Exhibit 13.) [68]

Q. Mr. Kirchmann, was the second charter entered into in writing?

A. The second charter was entered into in writing.

Q. And is this the second charter?

Mr. SUTRO.—I suppose this evidence is all offered, your Honor, upon the ground of reducing the damages. I suppose it could have been properly offered by us. I have not objected to it. Is that the theory of it, Mr. McClanahan?

(Testimony of Henry Kirchmann, Jr.)

Mr. McCLANAHAN.—It is the proof of our damage. You deny any damage.

Mr. SUTRO.—You are proving damages by proving the second charter. If that is your theory, all right.

Mr. McCLANAHAN.—Thank you.

The COURT.—Proceed.

Mr. McCLANAHAN.—We offer in evidence the charter-party identified by the witness, and dated November 1, 1919, between Sanders & Kirchmann, Inc., agents for owners of the American schooner "Commerce," and C. A. Blumer, the agent of the Vacuum Oil Company, Pty., Ltd. We ask that it be marked Libelant's Exhibit 14.

(The document was here marked Libelant's Exhibit 14.)

Your Honor, I suggest an adjournment.

The COURT.—We will try and take this case up again to-morrow afternoon at 2:00 o'clock.

(The further hearing of the case was then continued until Friday, April 22, 1921, at two o'clock P. M.)

[Endorsed]: Filed Jun. 13, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [69]

FRIDAY, APRIL 22, 1921.

HENRY KIRCHMANN, Jr., direct examination (resumed).

Mr. McCLANAHAN.—If the Court please, counsel has called for the production of a letter which I did not know was in existence. I have produced

(Testimony of Henry Kirchmann, Jr.)

it. I would like to offer it in evidence as a part of the testimony of Mr. Wolff.

The COURT.—Is there any objection?

Mr. SUTRO.—No, there is no objection.

The COURT.—Let it go in.

Mr. SUTRO.—Is Mr. Wolff going to stay here? Is he going to be in attendance here? If he is, I would like to ask him some other questions. You will be in attendance, Mr. Wolff, will you?

Mr. WOLFF.—Yes.

Mr. McCLANAHAN.—I can make a statement of the contents of this letter, or—

Mr. SUTRO.—It can be copied into the record.

Mr. McCLANAHAN.—Yes. Mr. Wolff testified that he was in doubt as to whether the negotiations with Mr. Slingerland for the charter were presented by him in written form to Mr. Slingerland, or whether Mr. Slingerland presented it to him. This is a letter from Mr. Wolff's firm to Mr. Slingerland, of the Standard Oil Company, making the proposition. I did not know of the existence of it.

The COURT.—You may proceed.

Mr. McCLANAHAN.—It reads as follows:

Libelant's Exhibit No. 15.

(Letter-head of Wolff, Kirchmann & Co.)

"TRIPLICATE.

In Replying, Please
Refer to our File No. 100. [70]

November 19, 1918,

Standard Oil Co.,
Bush & Sansome Sts.,
San Francisco, Calif.
Attention Mr. Slingerland.

Gentlemen:

Schooners 'LUZON'—'COMMERCE'—'SAMAR'—'FORESTER' AND 'PHILIPPINE' LAST HALF 1919 LOADING:

We confirm having chartered to you, in accordance with conversation with Mr. Slingerland, the above vessels to load cargoes of petroleum products in cases under deck and full deckloads of lumber from San Francisco to Auckland, Wellington, Lyttleton or Dunedin at your option on the following terms:

RATES: Case oil $1.37-½ per case; lumber $27.50 per M. ft. B. M.

DATES: Laydays to commence when vessels are ready to load, cancelling one hundred and thirtieth day after sailing for San Francisco if direct from Sydney or a New Zealand port or one hundred and tenth day if direct from South Sea Island port.

ITINERARY: Vessels, after completion of discharge under their existing case oil charters, to proceed to this coast—with cargo or in ballast or via Sydney or port or ports in New Zealand or South

(Testimony of Henry Kirchmann, Jr.)

Sea Islands to San Francisco, there to load for you.

OTHER CHARTER CONDITIONS: Same as last charter of the Schooner 'COMMERCE' for case oil.

It is understood that this charter is subject to all Governmental restrictions and/or regulations.

We are writing this letter in quadruplicate. Please sign two copies and return to us together with sufficient blanks to enable us to have original charter parties drawn.

Yours very truly,
WOLFF KIRCHMANN & CO.
A. E. WOLFF,
Manager.

AEW:EMC.

Charter confirmed.

STANDARD OIL COMPANY.
By R. N. SLINGERLAND." [71]

(The letter was marked Libelant's Exhibit 15.)

The COURT.—Are you through, now?

Mr. McCLANAHAN.—I would prefer to introduce in evidence the surveyor's report of the fitness of the vessel. I got a stipulation as to it yesterday, but I would prefer the surveyor's report to be introduced.

The COURT.—Very well.

(The document was here marked Libelant's Exhibit 16.)

Mr. McCLANAHAN.—Q. Mr. Kirchmann, between the dates of September 16th, when the vessel reported at the Point Orient dock, and the 11th of

(Testimony of Henry Kirchmann, Jr.)

October, when you received the letter purporting to cancel the contract, had you received from Mr. Blumer, or from Mr. Slingerland, or from anyone else, any intimation of the stand to be taken on the question of notice?

Mr. SUTRO.—I object to it on the ground that it is perfectly immaterial whether they had, or not.

The COURT.—He may answer it.

A. No, sir.

Mr. McCLANAHAN.—Q. The letter of October 11th was your first intimation or notice of any exception to be taken to the notice given?

A. Yes, sir.

Q. Between those dates, was it your expectation that the charter-party would be carried out?

A. It was—

Mr. SUTRO.—Just a moment, please. I object to the question upon the ground that it calls for the mental operation of the witness, and on the ground that it is immaterial, irrelevant and incompetent testimony.

The COURT.—He being one of the owners, I think it is competent; it may go in.

Mr. SUTRO.—That he expected that she would fill the charter?

The COURT.—Yes, just what his mental attitude was. [72]

Mr. SUTRO.—I take an exception to the ruling.

Mr. McCLANAHAN.—Q. How many charter-parties were negotiated in the year 1918, between your company as managing owner, and the Standard

(Testimony of Henry Kirchmann, Jr.)

Oil Company, wherein the charters were for the Vocuum Oil Company?

Mr. SUTRO.—I don't know that that is a material question, your Honor, there is only one charter under discussion here.

The COURT.—He may answer the question.

A. There were ten charters.

Mr. McCLANAHAN.—Q. There were ten charters in that year? A. In that year, yes.

Q. Prior to the 11th of October, 1919, had any of those charter-parties, negotiated in the year 1918, been carried out?

Mr. SUTRO.—I object to the question on the ground that it is not material.

Mr. McCLANAHAN.—It is all on the question of the purported agency of the Standard Oil Company for the Vacuum Oil Company.

The COURT.—The objection to the question as it is propounded is sustained. Whether any exception was taken to the authority under any of them might be material and competent.

Mr. McCLANAHAN.—I do not quite catch what your Honor says.

The COURT.—Whether any exception was taken to the authority of the agent who entered into the charter-party, that might be competent.

Mr. McCLANAHAN.—My purpose is to show that all of the charters that were carried out between this company and the Standard Oil Company for the Vacuum Oil Company prior to October 11,

(Testimony of Henry Kirchmann, Jr.)

were carried out in the same method as was the charter in suit.

The COURT.—Yes; whether they were carried out, that perhaps [73] might not be material, other matters might enter into that; whether authority to enter into this charter for this respondent might be material. That is what you desire to develop, I assume?

Mr. McCLANAHAN.—Yes, it is. I will try to frame my question thus:

Q. Was there during all the time when you were dealing with the Standard Oil Company for the Vacuum Oil Company any question of the authority of that company to act for the Vacuum Oil Company? A. I don't understand that question.

Mr. McCLANAHAN.—Read the question, Mr. Reporter.

(Question read by the reporter.)

A. To our knowledge, no.

Q. Was any written notice of readiness given either the Standard Oil Company, or to Mr. Blumer, in regard to the second charter of the schooner "Commerce"?

Mr. SUTRO.—I object to that is not material or competent.

The COURT.—Sustained.

Mr. McCLANAHAN.—Save an exception.

Q. Who paid freight on the second charter-party?

A. The Standard Oil Company.

Q. Who received the commission called for by the charter-party, as far as you know?

(Testimony of Henry Kirchmann, Jr.)

A. The Standard Oil Company.

Q. After her arrival at the dock at Point Orient, on September 16, did the vessel leave that dock until or before she had received her case oil cargo under the second charter-party? A. She did.

Q. She did what?

A. She shifted from one wharf to another wharf.

Q. But she did not leave Point Orient?

A. She did not leave Point Orient; no, sir.

Q. When was the loading under the second charter-party commenced? [74]

Mr. SUTRO.—I object to that on the ground that it is entirely immaterial; it has nothing to do with this charter.

The COURT.—I don't think—

Mr. McCLANAHAN.—I think the Court asked that very question itself yesterday.

Mr. SUTRO.—No, I don't think so.

The COURT.—Wherein is it material? I just inquired as to the fact, and that is in now. Wherein is it material to the second one?

Mr. McCLANAHAN.—I think it is part of the *res gestae,* your Honor.

The COURT.—Very well, if you feel that way about it, put it in.

Mr. SUTRO.—Exception.

Mr. McCLANAHAN.—Q. Do you know the date of the commencement of the loading under the second charter-party?

Mr. SUTRO.—The same objection and exception.

The COURT.—Yes.

(Testimony of Henry Kirchmann, Jr.)

A. November 7th.

Mr. McCLANAHAN.—Q. Can you identify these documents, Mr. Kirchmann?

A. This is the bill of lading for the "Commerce."

Q. Under the second charter-party?

A. Yes.

Mr. McCLANAHAN.—We offer these bills of lading in evidence.

The COURT.—All as one exhibit?

Mr. McCLANAHAN.—Yes, I think they may all go in as one exhibit.

The COURT.—Very well.

(The documents were here marked Libelant's Exhibit 17.)

Mr. McCLANAHAN.—Q. Did you furnish the form for the bill of lading for the case oil that I have just introduced in evidence? [75]

A. No, sir.

Mr. SUTRO.—Wait a moment. The witness does not give me a chance to object. That is an immaterial matter, your Honor, whether he did, or not.

The COURT.—He has answered it; let it stand.

Mr. McCLANAHAN.—Q. Mr. Kirchmann, have you had prepared in your office since adjournment yesterday a statement showing the difference between the freight under the first charter-party and under the second? A. I did.

Q. And is this the statement?

A. That is the statement.

Mr. McCLANAHAN.—I will show it to counsel.

(Testimony of Henry Kirchmann, Jr.)

Mr. SUTRO.—That is a mere matter of arithmetical computation.

Mr. McCLANAHAN.—It is for the Court's convenience. We offer it in evidence.

Mr. SUTRO.—We are not conceding the correctness of it. It is simply a mathematical computation.

Mr. McCLANAHAN.—It is not simple.

Mr. SUTRO.—I am not casting any reflections on the ability of the person who made it up. I say it is merely a mathematical calculation.

Mr. McCLENAHAN.—Yes, it is made for the convenience of the Court.

Mr. SUTRO.—Will you give me a copy of it?

Mr. McCLANAHAN.—Yes, we will supply you a copy of it.

The COURT.—Let it be admitted.

(The document was marked Libelant's Exhibit 18.)

Mr. McCLANAHAN.—That is all.

Cross-examination.

Mr. SUTRO.—Q. Mr. Kirchmann, the office of Wolff, Kirchmann & Co., and of Sanders & Kirchmann, Inc., at the time of the [76] transactions concerning which you have testified, were in the some place, were they not?

A. They were adjoining offices on the same floor of the building.

Q. They were adjoining offices on the same floor of the American National Bank Building?

A. The American National Bank Building, yes.

(Testimony of Henry Kirchmann, Jr.)

Q. Besides those two concerns, that is to say, Sanders & Kirchmann, Inc., and Wolff, Kirchmann & Co., you were conducting the business on your own account as Henry Kirchmann, Jr., were you not?

A. As a ship broker, yes.

Q. And your place of business was there, also?

A. Not in the office of Wolff, Kirchmann & Co.

Q. No, no, I mean adjoining.

A. Adjoining; yes.

Q. With Sanders & Kirchmann?

A. With Sanders & Kirchmann.

Q. They were all communicating rooms, were they not? A. Yes, sir.

Q. The office of Sanders & Kirchmann, Wolff & Kirchmann, and your own?

A. You could walk from one office to another.

Q. You said, on your direct examination, that between September 16th and October 11th you had received no word from anybody about the "Commerce"?

A. I had received no word about the "Commerce"—what do you mean?

Q. Did you say that between September 16, 1919, and October 11, 1919, when the notice of cancellation was given, on that later date, you had received no word about the "Commerce" from either Mr. Blumer or Mr. Slingerland, or anybody connected with the Vacuum Oil Company and the Standard Oil Company?

A. I received no word from them that ever intimated they were going to cancel their charter.

(Testimony of Henry Kirchmann, Jr.)

Q. Either verbally or in writing?

A. Either verbally or in writing.

Q. Did you see those gentlemen during that time? You were here, [77] weren't you?

A. I don't think I saw either of them.

Q. You were in town, were you not?

A. I am not sure whether I was in town or not.

Q. Do you know whether or not you were in town?

A. I was on September 16th, I was on that date; as to whether I was in town up to October 11th, I am not sure. In fact, my recollection is I was out of town on October 11th.

Q. October 11th? A. I think so.

Q. Where were you, if you recall?

A. I think I was in San Rafael at that time.

Q. But you came back to San Francisco on that day: Is that what you mean?

A. I don't think so at that time.

Q. Were you living in San Rafael?

A. I was living in San Anselmo at that time, and I had business over in San Rafael.

Q. You mean just on that day?

A. For several days I was over there.

Q. But you came over to San Francisco every day?

A. There were several days that I did not come to San Francisco at all.

Q. For how long a time?

A. It probably covers a period of a week.

Q. From October 11th to October 18th?

(Testimony of Henry Kirchmann, Jr.)

A. No, it was prior to October 11th.

Q. Let me understand this: Between September 16th and October 11th you were away for a week, you think?

A. There was some time I was away, whether it was for a week, or not, I could not be sure, but I feel certain I was away at that time. I could look it up and be certain.

Q. You say at that time: You mean between September 16th and October 11th?

A. On September 16th I was in town, but whether I was in town on October 11th, I am not certain.

Q. Were you away between September 17th and October 11th? [78]

A. I cannot say just on what date I was away.

Q. Were you away for any length of time?

A. Yes, I was away for some time.

Q. In San Anselmo?

A. In San Anselmo and San Rafael.

Q. San Anselmo and San Rafael are points that can be reached within an hour from San Fran-

A. But there were matters there that took up my time.

cisco?

Q. I say that San Anselmo and San Rafael are points that can be reached within an hour from San Francisco? A. Yes, sir.

Q. There is a regular ferry boat service and a regular local train service? A. Yes.

(Testimony of Henry Kirchmann, Jr.)

Q. I don't understand what you mean. After October 11th you came back: Is that right?

A. Whether it was just after October 11th or later than that, I cannot say for certain; I was back the latter part of October, anyway.

Q. You were back the latter part of October?

A. I was back the latter part of October, yes.

Q. With whom did you have this business in San Anselmo, or in San Rafael?

Mr. McCLANAHAN.—I don't think that is material, is it?

Mr. SUTRO.—I don't have to disclose my purpose now. It may help us to fix the time when the witness was away.

Mr. McCLANAHAN.—I don't know but what this is trying to pry into private matters.

The COURT.—Sustained.

Mr. SUTRO.—I am not asking him the nature of the business, I just want to find out the persons with whom he had the business.

Mr. McCLANAHAN.—That is immaterial.

The COURT.—Proceed.

Mr. SUTRO.—Q. Mr. Kirchmann, you say you don't know whether you were here on October 11th?

A. I don't think I was here on [79] October 11th.

Q. Did you see the letter that Mr. Slingerland wrote on that day, I mean that Mr. Blumer wrote on that day?

A. I don't think I saw that until I returned.

Q. Until what?

(Testimony of Henry Kirchmann, Jr.)

A. Until I returned. I am quite sure I did not see it on October 11th; it was several days after that before I returned.

Q. How many days?

A. Probably within a week.

Q. You saw it within a week?

A. Within a week.

Q. Do you recall the letters that were written in reply to that letter? A. Yes, I do.

Q. You were here when they were written, were you not?

A. Some of them; the latter part of October, yes; some of the earlier letters I probably was not aware of.

Q. Referring to Exhibit No. 3, the letter from Mr. Blumer on October 11th, will you kindly tell us when you first saw that?

A. On my return to the office.

Q. How long after that letter was received at the office? A. Probably within a week.

Q. Within a week? A. Yes, sir.

Q. Do you recall Exhibit 4?

A. This is also probably within a week.

Q. You did not dictate that letter, then?

A. No, sir.

Q. And Exhibit No. 5?

A. I might have returned by this time, but I am not certain.

Q. You do recall, however, the answer to that?

A. Yes, sir.

(Testimony of Henry Kirchmann, Jr.)

Q. That would be Exhibit No. 6; that was written when you were in the office?

A. Yes, this letter was written after I was back.

Q. You dictated that letter, didn't you?

A. No, I didn't dictate it.

Q. You saw the letter before it was sent?

A. I saw the letter [80] before it was sent.

Q. Now, Exhibit No. 7, you were in the office when that was received at your office?

A. Yes, sir.

Q. And you recognize that? A. Yes, sir.

Q. And Exhibit No. 8, did you dictate that?

A. I didn't dictate it; no, sir.

Q. But you saw it before it was sent?

A. I saw it before it was sent.

Q. Now, Mr. Kirchmann, you said that the "Commerce" sailed from Levuka on June 19th?

Mr. McCLANAHAN.—About June 19th.

Mr. SUTRO.—Well, I just want to fix the date. When you made your opening statement you asked me if I would stipulate to the date and I said, yes. I would like to get that date fixed in the record. I have a copy of the master's declaration, or whatever you call it, and it says June 19th is the date. Do you want to stipulate that that is the date?

Mr. McCLANAHAN.—Yes.

Mr. SUTRO.—Very well. It is stipulated that she sailed from Levuka on June 19th.

Q. You said, Mr. Kirchmann: "I had received a designation of the loading berth from the Standard Oil Company." Do you recall who of the Standard

(Testimony of Henry Kirchmann, Jr.)

Oil Company designated the loading berth to you?

A. No, sir. We had many conversations with the Standard Oil Company—

Q. Just answer my question: You don't recall?

A. No, sir.

Q. Do you recall the words that were said to you?

A. The exact words, no; the purport of them, yes.

Q. I ask you for the exact words; you don't recall them? A. No.

Q. Do you remember when it was that you received the designation? [81]

A. A day or two prior to the time the vessel proceeded to Point Orient.

Q. A day or two prior to that time; that would be September 15th or 14th?

A. 14th or 15th; it might have been the 13th if the 14th was a Sunday.

Q. Had you inquired for a loading berth?

A. Yes, sir.

Q. You asked the Standard Oil Company?

A. Certainly.

Q. Who did you ask?

A. The Standard Oil Company were—

Q. I ask you, who did you ask?

A. The Standard Oil Company.

Q. Who in the Standard Oil Company?

A. I don't know. I talked to many in the Standard Oil Company.

Q. Who did you talk to?

A. I probably asked for Mr. Slingerland's office.

(Testimony of Henry Kirchmann, Jr.)

Q. You probably asked; do you know who you talked to?

A. I do not, other than the Standard Oil Company.

Q. I didn't ask you that, I asked do you know who you talked to.

A. Other than the Standard Oil Company; no.

Q. You are quite clear in your recollection, however, that you rang up the Standard Oil Company?

A. Yes, sir.

Q. And that you did it continuously from the time the vessel was on the dry-dock until September 13th or 14th? A. What is that?

Mr. SUTRO.—Read the question, Mr. Reporter.

(Question read by the reporter.)

A. That I did what.

Q. Rang up the Standard Oil Company to have a berth designated?

A. No, not continuously; the Standard Oil Company was ringing me up continuously, wanting to know how the "Commerce" was getting along.

Q. Do you know who in the Standard Oil Company you would talk to on those occasions?

A. Sometimes Mr. Slingerland, sometimes [82] Mr. Peas, sometimes Mr. Moore, and other times the telephone call would simply come in saying, "This is the Standard Oil Company," to which we would reply.

Q. And what would the question be?

A. How the "Commerce" was getting along.

Q. And that would continue along up to within

(Testimony of Henry Kirchmann, Jr.)

two or three days of when she sailed up there?

A. Yes, they wanted to know when she would go up.

Mr. SUTRO.—Will you, gentlemen, kindly produce a letter dated September 4, 1919, from the Standard Oil Company to Messrs. Sanders & Kirchmann, Inc.?

Mr. McCLANAHAN.—I cannot produce it now. I have not had any notice to produce it. I have never seen it, myself.

Mr. SUTRO.—Then, subject to the production of the original, I will show the witness a copy.

Mr. McCLANAHAN.—Let me see it.

Mr. SUTRO.—Yes. I am not offering it now. I am just going to show it to the witness, first.

Q. I will show you what purports to be a copy of a letter addressed from the Standard Oil Company to Sanders & Kirchmann, Inc., dated September 4, 1919, and I ask you if you recognize such a letter, or if Sanders & Kirchmann received such a letter?

A. I have no recollection of it. This is on the schooner "Luzon," isn't it?

Q. Yes. A. I have no recollection of it.

Q. As far as you know, such a letter was never received?

A. No; it might have been, but I have no recollection of it.

Q. You have no recollection of it? A. No.

Q. I will show you a letter from Sanders & Kirchmann to the Standard Oil Company, dated

(Testimony of Henry Kirchmann, Jr.)

September 4, 1919, and ask you if you recognize that. A. Yes, sir. [83]

Q. You recognize that? A. Yes, sir.

Q. That letter was sent, was it?

A. That letter was sent.

Mr. SUTRO.—We will offer in evidence the letter of September 4, 1919, to Sanders & Kirchmann, from S. G. Casad, which is as follows:

Respondent's Exhibit "A."

(Letter-head of Standard Oil Company.)

"San Francisco, Cal., Sept. 4, 1919.

In replying please refer to S–429–1

Sanders & Kirchmann, Inc.,
212–216 American National Bank Bldg.,
San Francisco, California.

Gentlemen:

Schooner 'LUZON.'

Referring to your letter of today requesting that we give you berthing instructions for the above vessel, which you state you expect will be ready to berth Saturday, Sept. 6, 1919:

Will you kindly look to Mr. C. A. Blumer, 741 Mills Building, San Francisco, for information of this character, and do likewise with respect to any other unfinished charter parties with the Vacuum Oil Co., Pty., Ltd.

(Sgd.) S. G. CASAD, R. N. S."

(The letter was marked Respondent's Exhibit "A.")

(Testimony of Henry Kirchmann, Jr.)

We offer in evidence the letter identified by the witness, dated September 4, 1919, from Sanders & Kirchmann to the Standard Oil Company, to which Exhibit "A" is the answer. That letter is as follows:

Respondent's Exhibit "B."

(Letter-head of Sanders & Kirchmann, Inc.)

"San Francisco, Cal., September 4th, 1919.

Standard Oil Co.,
200 Bush Street,
San Francisco.
Attention Mr. Slingerland.

Gentlemen:

Schooner 'Luzon'—CASE OIL CHARTER-PARTY, DATED SAN FRANCISCO, NOV. 19, 1918. [84]

This vessel is now on the dry-dock and we expect she will be ready to berth Saturday, September 6th, 1919. Will you please give us berthing instructions promptly?

Yours very truly,
SANDERS & KIRCHMANN, INC.
By H. KIRCHMANN,
Secretary."

(The letter was marked Respondent's Exhibit "B.")

Q. In pursuance of the letter of Mr. Slingerland, or Mr. Casad—as a matter of fact, Mr. Kirchmann, Exhibit "A" was written by Mr. Slingerland, wasn't it—it is signed "R. N. S."

(Testimony of Henry Kirchmann, Jr.)

Mr. McCLANAHAN.—He said he didn't recognize the letter.

Mr. SUTRO.—Yes, that is a fact, he said he didn't recognize it.

Q. Do you recall whether or not, in pursuance of that letter, Sanders & Kirchmann wrote to Mr. Blumer? A. I do not.

Q. I show you a letter and ask you if you recognize it. A. Yes.

Q. That letter was sent, was it? A. Yes, sir.

Q. And this is a copy of the letter that was attached to it?

A. I don't know. May I see this letter a minute? Yes, I presume that is the letter that was attached to it.

Mr. SUTRO.—Now, while I am reading this, I will show these next so as to save time. Counsel can look at them. I offer in evidence a letter dated September 4, 1919, from Sanders & Kirchmann to C. A. Blumer, reading as follows:

Respondent's Exhibit "C."

San Francisco, Cal., September 4th, 1919.

Mr. C. A. Blumer,
Mills Building,
San Francisco.

Dear Sir:

We enclose herewith copy of our letter to the Standard Oil Co. requesting berthing instructions for the Schooner "Luzon.' In case we are not correct in asking the Standard Oil Co. for these in-

(Testimony of Henry Kirchmann, Jr.)

structions, will you kindly give them to us, [85] and oblige,

Yours very truly,
SANDERS & KIRCHMANN, INC.
By H. C. KIRCHMANN,
Secretary."

The letter that was attached to that and referred to in this letter is the letter of September 4, 1919, from Sanders & Kirchmann to Standard Oil Company, asking for berthing instructions regarding the "Luzon."

The COURT.—Those are both one exhibit?

Mr. SUTRO.—Yes.

(The documents were here marked Respondent's Exhibit "C.")

Q. While they are examining that, I want to ask you something: Referring to this Exhibit 7, which you said you saw when it was received, that you were in the office, and also Exhibit 8, which you saw before it was sent, and Exhibit 6, which you saw before it was sent, before those letters, 6 and 8, were sent, you had looked at the prior correspondence which had passed between Mr. Blumer and your office on that subject, had you not, that is to say, the cancellation of the charter? A. Yes, sir.

Q. And had read them and examined them carefully, had you not? A. Yes, sir.

Mr. McCLANAHAN.—What charter is that, the "Commerce"?

Mr. SUTRO.—Yes, the charter we are talking about here.

(Testimony of Henry Kirchmann, Jr.)

Q. When I say you had read these letters, I mean Mr. Blumer's cancellation notice of October 11?

A. Yes.

Q. And the reply from your office on October 11?

A. Yes.

Q. And Mr. Blumer's letter of October 14th?

A. Yes.

Q. And the reply from your office on October 15?

A. Yes.

Q. Also Mr. Blumer's letter on October 15th?

A. May I see those letters, so that I can be sure of the dates as you are calling them off?

Q. Yes; they are the same ones that you saw before? A. Yes. [86]

Q. I now show you two letters, dated respectively September 5, 1919, and September 6, 1919, from Sanders & Kirchmann to Mr. Blumer.

A. These letters were written by Sanders and Kirchmann.

Mr. SUTRO.—We offer these in evidence. The letter of September 5th, from Sanders & Kirchmann to C. A. Blumer, is as follows:

Respondent's Exhibit "D."

(Letter-head of Sanders & Kirchmann, Inc.)

"San Francisco, Cal., Sept. 5th, 1919.

Mr. C. A. Blumer,
Mills Building,
San Francisco.

Dear Sir:

Under date of September 4th we were in receipt

of a letter from the Standard Oil Co., San Francisco, asking us to look to your goodself for berthing instructions for our Schooner 'Luzon.' This you will note we did, thru our letter to you under date of September 4th.

This is also to confirm our conversation of even date, that we expect this vessel will come off the dry dock this evening and will be ready to tow to loading port on Saturday, the 6th inst. We have, however, arranged to tow the vessel on Sunday, the 7th inst., and meanwhile await your instructions for berthing.

We are enclosing herewith an affidavit from the master of the Schooner 'Luzon,' being an abstract from his log of the dates of May 24th and 25th, 1919, and from which you will note the vessel sailed on the 24th of May, 1919.

Yours very truly,
SANDERS & KIRCHMANN, INC.
By H. KIRCHMANN,
Secretary."

I am not offering the affidavit, because it is not part of this case. The importance of this letter is to show that they got the other letter.

(The letter was here marked Respondent's Exhibit "D.")

The letter of September 6th is from Sanders & Kirchmann [87] to Mr. Blumer, and reads as follows:

(Testimony of Henry Kirchmann, Jr.)

Respondent's Exhibit "E."

(Letter-head of Sanders & Kirchmann, Inc.)

"San Francisco, Cal., Sept. 6th, 1919.

Mr. C. A. Blumer,
Mills Building,
San Francisco.

Dear Sir:

Schooner 'LUZON.'

Confirming our telephone conversation of this morning, we have agreed to hold this vessel for loading orders until Monday or Wednesday next, but it is agreed and understood that her lay days for loading commence Wednesday, A. M., September 10th, 1919.

Enclosed please find Surveyor's report from the Board of Marine Underwriters of S. F.

Thanking you for your favors, we remain,

Yours very truly,
SANDERS & KIRCHMANN, INC.
By H. KIRCHMANN,
Secretary."

(The letter was marked Respondent's Exhibit "E.")

Q. The lay-days, and the commencement of them, is an important matter, isn't it? A. I don't know.

Q. You are in the shipping business, and have been, you have said, for a good many years?

A. And what was your question?

Mr. SUTRO.—Read the question, Mr. Reporter.

(Question repeated by the reporter.)

(Testimony of Henry Kirchmann, Jr.)

A. With ships, yes, it is.

Q. That is because the demurrage runs from the running of the lay days, does it not?

A. Yes, that is correct.

Mr. SUTRO.—Will your Honor indulge me a moment? The letters eliminate a good deal of the cross-examination, and, therefore, save time. Your Honor will indulge me while I look over these notes.

Q. Mr. Kirchmann, you were asked this question: [88]

"Q. Did you find his office there?

"A. I found his office; on the door was only the name C. A. Blumer.

Q. Did you, from Mr. Slingerland, learn at that time that he was representing the Vacuum Oil Company? A. I did not."

Is that correct?

A. At that time I was not notified by Mr. Slingerland that he was representing the Vacuum Oil Company.

Q. What time do you refer to?

A. When I was sent over to his office.

Q. For what purpose were you sent over to his office?

A. In negotiating charters with Mr. Slingerland, from time to time I would be asked to see someone else; that is a big office; at this time I was asked to go and see Mr. Blumer.

Q. What time do you refer to? What time of the year, when?

A. The date of that I am not positive.

(Testimony of Henry Kirchmann, Jr.)

Q. Was that October, or November, or when was it? A. It was some time prior to September.

A. Yes, sir.

Q. Do you recall how long prior? A. I do not.

Q. Mr. Kirchmann, when you went to my office, after this cancellation of the charter had been given, and this libel had been commenced, you came there, did you not, as the result of a communication from Mr. Denman? A. Yes.

Q. Mr. Denman and I were in Portland, weren't we? That is to say, Mr. Denman so represented to you? There was a wire sent to you from Portland by Mr. Denman, wasn't there?

A. I don't recollect that.

Q. You don't recollect that?

A. No, I don't recollect that.

Q. Are you sure of your statement that the charter was finally consummated in my office?

A. Yes, sir.

Q. Don't you recall that you came to no agreement in my office, [89] and you all walked out?

A. We walked out, and then Mr. Blumer came to the elevator and called me back.

Q. That is your recollection, is it?

A. That is my recollection, yes.

Q. I simply wanted to correct that, Mr. Kirchmann, because it is not my recollection at all, and my recollection is very definite on the matter, because you all went out. I don't care to take the witness-stand personally if I can straighten this out

(Testimony of Henry Kirchmann, Jr.)

with you. It is not a matter of any great consequence, as I see it. Neither is that Mr. Blumer's recollection. See if this does not refresh your recollection. It is better for all concerned if there were no lawsuits; Mr. Denman and I had agreed in Portland to send you each a wire; pursuant to that agreement, I had sent Mr. Blumer a wire in which we suggested to you both to give and take, but that we came to no understanding and you all walked out of my room. Does that refresh your memory?

A. My memory is this way: We called at your office and saw you there, and saw Mr. Blumer there, and we tried to get together on the charter-party; you offered us a charter-party at a little higher rate if we would dismiss the libel, which we would not accept, and we left your office without coming together on the charter, and when we got to the elevator Mr. Blumer came after us and called us back, and the charter was closed.

Q. You gave your deposition in this case some time ago, did you not? A. Yes.

Q. Do you recall when it was?

A. It was prior to my leaving for the Philippine Islands.

Q. Well, it was on January 6, 1921. Did you read that deposition yesterday, before you testified here? A. I did.

Q. When did you read it?

A. Yesterday forenoon. [90]

(Testimony of Henry Kirchmann, Jr.)

Q. I will ask you if on that deposition you testified as follows, referring to this interview:

"Q. Who were present at that time?

A. Mr. Blumer, Captain Beatty and myself.

Q. What was the nature of your business there?

A. We were over to see Mr. Blumer in connection with the business of the schooner 'Luzon.'

Q. While you were there, did you have any conversation with Mr. Blumer in regard to the schooner 'Commerce'?

A. Yes, I introduced Captain Beatty as the Master of the schooner 'Luzon,' and then Mr. Blumer asked me about the 'Commerce,' how the 'Commerce' was getting along loading, and I told him that the towboat had been ordered to take her up to the river that morning, up to the oil wharf that morning, and that she was either up there or en route up there."

Did you so testify? A. That is correct.

Q. And did you testify as follows:

"Q. Was anything further said?

A. Then Mr."—

and then there are some dashes here, indicating a hesitation on your part, and then it proceeds as follows:

"Now, wait a moment, just ask me that question again, I didn't quite get that.

"Q. Did you say anything further beyond that the schooner was up, or going up?

(Testimony of Henry Kirchmann, Jr.)

A. That she was going up or going up to load, and I asked Mr. Blumer if he required any further notice with reference to her loading, and he answered no, that that was all that would be necessary.

Q. Was that all that transpired with regard to the 'Commerce'?

A. That is all that transpired with reference to the 'Commerce,' as our business was with reference to the 'Luzon.'" [91]

Did you so testify? A. I did.

Q. On cross-examination you were asked by me:

"Q. Mr. Kirchmann, you were present, Mr. Kirchmann, when the deposition of Captain Beatty was taken in this cause on October 22, 1919, were you not?

A. At this office—yes, if that is the deposition.

Q. His deposition was taken only once, and you were present on that occasion?

A. I was present at that time; yes.

Q. Have you ever seen a transcription of the testimony of Captain Beatty?

A. I have.

Q. When did you last see it? A. To-day.

Q. When to-day?

A. About ten or fifteen minutes ago.

Q. Did you read it over?

A. I read it over.

Q. Did you read it over carefully?

A. I read it over.

(Testimony of Henry Kirchmann, Jr.)

Q. Who showed it to you?

A. Mr. Resleure.

Q. Did you ask to see it?

A. Yes, I asked to see it."

Did you so testify? A. I did.

Q. When you went to Mr. Blumer's office on September 16th, Mr. Kirchmann, what was the business that you had in hand?

A. It was business in connection with the "Luzon," in that the "Luzon" had completed loading her case oil.

Q. And you also had in mind to notify him about the "Commerce" being ready to load?

A. No, I did not; that came up at the time, and I so notified him.

Q. Oh, you happened to think of it, did you?

A. Mr. Blumer brought the question up, he wanted to know how the "Commerce" was getting along, and I told him she was towed up the river that morning.

Q. Do you remember what he said?

A. He said, "How is the 'Commerce' getting along?" [92]

Q. And what was your answer?

A. My answer was that the towboat had been ordered at daylight this morning, and that she was either at the wharf or on the way up.

Q. Do you know what towboat it was?

A. I do not.

Q. Did you order her?

A. The towboat was ordered from our office—

(Testimony of Henry Kirchmann, Jr.)

Q. Did you order her?

A. The towboat was ordered from our office—

Q. I didn't ask you that, did you order her?

A. I cannot say.

Q. Don't you know whether or not you ordered her? A. I do not.

Q. You don't know which towboat it was?

A. I do not.

Q. And you don't know of your own knowledge that the "Commerce" was on the way up, do you?

A. Yes.

Q. Did you see her? A. No, I didn't see her.

Q. And you didn't give the order for the towboat? A. I might have, but I am not sure of it.

Q. What did Mr. Blumer then say, if anything?

A. He asked me how the "Commerce" was getting along; I told him she towed up that morning. I asked him if he required any further notice, and he said no.

Q. When you went back to your office that day, Mr. Kirchmann, did you write to Mr. Blumer?

A. I don't recollect.

Q. But your memory about the conversation is very clear? A. Very clear.

Q. Very clear and very definite? A. Yes.

Q. The business that you went there in connection with, the "Luzon," had also to do with other schooners, didn't it?

A. No, sir, only the "Luzon"; the "Luzon" and the mention of the "Commerce," that is all that came up.

(Testimony of Henry Kirchmann, Jr.)

Q. Is it not a fact that it had to do with the agency commission [93] of 2½ per cent which Mr. Blumer was charging your vessels on arriving in Australia or New Zealand ports, for services by his company to your vessels?

A. Yes. That refreshes my memory. That came up.

Q. Is not that the business on which you went there?

A. It was either that, or clearing the "Luzon"; of that I am not certain.

Q. What about the "Luzon"?

A. The "Luzon" had been loaded here.

Q. What was the business about her? You said it was either that or about the "Luzon"—what was that you said?

A. You have refreshed my memory; we went over there in reference to the agency commission charge in New Zealand, on the "Luzon." You are right.

Q. I ask you to look at this letter and see if you recognize it. A. This is correct.

Mr. SUTRO.—Have you a letter of September 15, from Mr. Blumer to Sanders & Kirchmann?

Mr. McCLANAHAN.—No, and I know of no such letter.

Mr. SUTRO.—I have a copy here.

Mr. McCLANAHAN.—I would have been glad to produce them if I had notice that you wanted them.

Mr. SUTRO.—I understand that, Mr. McClanahan. I am not questioning your gladness, etc.

Mr. McCLANAHAN.—But that is the proper procedure, Mr. Sutro. You are getting in a lot of copies of letters which I have never seen. You have not asked me to produce the originals.

Mr. SUTRO.—I am asking you now.

Mr. McCLANAHAN.—I cannot produce them; I have never seen them. You gave no notice.

Mr SUTRO.—If these copies are not correct, you can substitute the original. [94]

Mr. McCLANAHAN.—This is a very unusual way to get in copies.

Mr. SUTRO.—Mr. McClanahan, as you know, there is a direct conflict in the testimony in this case, that is to say, the testimony given by your witnesses and the testimony given by our witnesses. I do not feel called upon, and I have not felt called upon to disclose my line of examination to you by asking you to produce letters before I offer them in court.

Mr. McCLANAHAN.—I say, that is an unusual procedure. It is not the usual practice.

Mr. SUTRO.—It is my practice; I have done it many times where I have had similar occasion to do it.

The COURT.—How are we going to find out that these are correct copies, unless it is admitted that they are?

Mr. SUTRO.—He can examine them.

The COURT.—I will state that the rule with us

(Testimony of Henry Kirchmann, Jr.)

is, when you want originals produced you make a demand and serve it, and then the other side produces them in court. It is not the practice to come into court with copies and offer them, and then afterwards verify them.

Mr. McCLANAHAN.—That is the practice here, also, your Honor.

The COURT.—Let us find out whether these are copies, or not.

Mr. SUTRO.—There has been no question about them so far, your Honor.

The COURT.—Well, submit them to counsel or to the witness.

Mr. SUTRO.—They refer one to the other.

Q. Do you recognize that letter, Mr. Kirchmann?

A. I do not; I don't recollect it.

Mr. McCLANAHAN.—The witness has not identified it.

Mr. SUTRO.—I understand that.

Mr. McCLANAHAN.—I have never seen it before.

This is most [95] unusual.

Mr. SUTRO.—I understand what you say about it, Mr. McClanahan. We offer in evidence an original, dated September 16th, from Sanders & Kirchmann to C. A. Blumer.

Q. As a matter of fact, Mr. Kirchmann, you dictated that letter, didn't you?

A. I might have; very likely I did.

Mr. SUTRO.—It reads as follows:

Respondent's Exhibit "F."

(Letter-head of Sanders & Kirchmann, Inc.)

"San Francisco, Cal., Sept. 16, 1919.

Mr. C. A. Blumber,
Mills Building,
San Francisco.

Dear Sir:

Acknowledging receipt of your favor of the 15th inst. and confirming conversation of this morning at your office, along with Captain Alex Beattie of our schooner 'Luzon.'

This is to advise you that we decline to pay the 2½ per cent agency fee which you have billed against the schooners 'Luzon,' 'Commerce' and 'Samar.' We are prepared to pay what we consider the usual fee—£5–5–0, and if you will render us corrected bills, will be pleased to send you check.

Yours very truly,
SANDERS & KIRCHMANN, INC.,
By H. KITCHMANN,
Secretary."

(The letter was here marked Respondent's Exhibit "F.")

Mr. McCLANAHAN.—I think it is proper that I should object to the introduction of all these copies, if your Honor please, without first being given the opportunity at least of verifying them with the originals. I will be glad to do that.

The COURT.—It is pretty late as to those that have gone in.

Mr. McCLANAHAN.—The whole procedure is unusual.

The COURT.—We want the usual procedure followed here. [96]

Mr. McCLANAHAN.—It is the usual proceeding that we be asked to produce the original, and then if we fail the copy can go in. These copies are not evidence.

The COURT.—But no objection has been made.

Mr. McCLANAHAN.—I objected right from the start.

Mr. SUTRO.—Not on that ground.

The COURT.—No, not on that ground.

Mr. McCLANAHAN.—I didn't make a formal objection; no.

Mr. SUTRO.—Mr. McClanahan, I will give you copies of these letters, and you can check them up, and if they are not correct, these will be withdrawn.

The COURT.—No, I am not going to allow that.

Mr. SUTRO.—Well, no objection to them was made on the ground that they are copies.

Mr. McCLANAHAN.—When counsel commenced, I didn't know but what there was only one letter; here is a whole string of correspondence which I have never seen, and I never have been asked to produce the originals. I object as immaterial, irrelevant and incompetent, and secondary evidence, and ask that they be stricken from the record.

Mr. SUTRO.—I say that the objection comes too late; it should have been made at the time of the offer.

(Testimony of Henry Kirchmann, Jr.)

The COURT.—The copies have gone in without objection, I cannot strike them out now.

Mr. SUTRO.—Q. When did the "Commerce" go on the drydock?

A. The "Commerce" went on the dry-dock probably about five or six days prior to September 16.

Q. You do not know definitely, of your own knowledge?

A. The definite date, no; I would have to look up the office record.

Q. These ten charters to which you referred, were all made at one [97] time, were they not, in September, 1918?

A. All made in the one month; I would have to look at my office record to make sure of that; my impression is they covered a series of months.

Q. That they covered a series of months?

A. Yes.

Q. I think your own exhibit is there. I will refresh your memory by it. Your counsel offered an exhibit here. Well, I don't care to pursue that matter now. You think they covered a series of months?

A. I think they cover a series of months. That is my impression.

Mr. SUTRO.—That is all.

Redirect Examination.

Mr. McCLANAHAN.—Q. Mr. Kirchmann, did you make a memorandum, from your office books, of the charters that were made with the Vacuum Oil Company? A. I did.

(Testimony of Henry Kirchmann, Jr.)

Q. And is that the copy you refer to?

A. Yes, that is the copy I refer to.

Mr. McCLANAHAN.—We offer this memorandum in evidence.

Mr. SUTRO.—I object to that as entirely immaterial, irrelevant and incompetent, it doesn't have any bearing on the issues before the court

Mr. McCLANAHAN.—It shows the dates the charters were filed.

The COURT.—Let it be admitted.

(The document was here marked Libelant's Exhibit 19.)

Mr. McCLANAHAN.—Q. Those letters that have gone in here from counsel's hands were letters that pertained to the "Luzon" and not to the "Commerce": Is that correct?

A. Yes, to the "Luzon."

Mr. McCLANAHAN.—We ask for an order opening the deposition of Alexander Beattie. I offer in evidence the deposition of Alexander Beattie, taken on behalf of the libelant, on Wednesday, [98] October 22, 1919.

The COURT.—Let it be opened and received in evidence.

Mr. McCLANAHAN.—May I read the deposition, if your Honor please? It is very short.

The COURT.—Yes, if you care to.

Mr. SUTRO.—I suggest that you omit the introductory part.

Mr. McCLANAHAN.—Yes, I will just read the testimony.

The COURT.—Read the questions and answers.

Mr. McCLANAHAN.—Very well, your Honor, it is not long. (Reads.)

I ask that the deposition of Charles Anderson be opened; it was a deposition taken on behalf of the libelant, on Tuesday, September 7, 1920. I ask for the same order in this. Omitting the stipulation, the deposition reads as follows:

(Counsel reads down to the beginning of the Commissioner's certificate.)

It seems that the deposition contains some further evidence in the certificate of the Commissioner, which I will read to the Court—

Mr. SUTRO.—Before you read that, the recital of the Commissioner is the usual recital until it comes to this particular part—I think a most unusual part, and I will read it to your Honor:

> "I further certify that on the following day, to wit, on Wednesday, September 8th, the said Charles Anderson appeared in my office and stated that he desired to correct his testimony, whereupon the following occurred."

Then the Commissioner asked the captain questions, and the captain answered them. We had no notice of this proceeding, we were not there. This Commissioner was not appointed for that purpose, [99] either by stipulation or by order of the Court. I submit that the entire proceeding, so far as the Commissioner was concerned, was extremely irregular, and that any testimony that he took in that *ex parte* fashion is not competent in any sense to

be received in this court. He was not appointed by stipulation or order of court, or in anywise to do such a thing.

Mr. McCLANAHAN.—I think it is a little late to make that objection.

The COURT.—There is no objection to the Commissioner, I take it?

Mr. SUTRO.—Not at all. It is to the questions that the Commissioner, in this *ex parte* and star-chamber proceeding propounded.

The COURT.—The Court could not consider that testimony.

Mr. McCLANAHAN.—My point is this: If there was any objection to this, it should have been made and brought up earlier than this, for the reason that if it had been, we might have had the opportunity of curing any defect. To make the objection now, your Honor, we are not able to cure any defect which may appear in it.

Mr. SUTRO.—In answer to that last suggestion, I would like to say that there never has been any opportunity until this moment to make the objection.

The COURT.—A motion could have been made to suppress it.

Mr. McCLANAHAN.—I will say, for the Court's information, that I am informed by Mr. Resleure —he can state it for himself.

Mr. RESLEURE.—I was present in the Commissioner's room when this extra testimony was taken; Mr. Denman furnished the Commissioner with the

authority for that procedure, and the Commissioner went ahead. [100]

The COURT.—It may be read; just what consideration I will give it is another matter.

Mr. SUTRO.—For the sake of the record, your Honor, may I have an exception to it?

The COURT.—Yes.

Mr. McCLANAHAN.—It reads as follows: (Reads.)

Mr. SUTRO.—If your Honor please, we ask that that examination by the Commissioner be stricken from the record; I just make the motion to preserve the objection upon the grounds stated.

The COURT.—Yes; I will let it stand, and what consideration I will give it will be a matter for the future.

Mr. McCLANAHAN.—I have a stipulation here that we may make an amendment to the amended libel covering the ownership. I feel sure we have proven this by Mr. Kirchmann in presenting the certificate.

Mr. SUTRO.—You ask me, in this document, to stipulate that the following is the fact: I don't know it. Is that what you want me to do?

Mr. McCLANAHAN.—It is this stipulation. It is hereby stipulated and agreed by and between the parties hereto that the amended libel on file herein may be amended in the following particulars:

1. By substituting H. W. Westphal, in place of the San Mateo Realty & Security Company, as a party libelant.

2. By striking out the name of Tillman & Bendel, a corporation, from the title of said cause, and by inserting in place thereof, the name Thusnelda Wilkens.

3. By inserting, in line 13, page 2, Article III of said amended libel, after the words "times since," the following: "Except that prior to the 18th day of April, 1919, said San [101] Mateo Realty & Security Company was the owner and holder of an interest as part owner in the said schooner "Commerce," and that on said day said San Mateo Realty & Security Company assigned its said interest to libelant, H. W. Westphal; and that on the 21st day of April, 1919, said Tillman & Bendel was the owner and holder as part owner of an interest in said schooner "Commerce," and that on said day said Tillman & Bendel assigned its interest in said schooner "Commerce" to libelant Thusnelda Wilkens.

Mr. SUTRO.—All right.

Mr. McCLANAHAN.—And the admission is made that the corporations named in the libel are existing corporations.

Mr. SUTRO.—Relying again on the statement of counsel that that is the fact, I will stipulate to it.

The COURT.—Very well, proceed.

Mr. McCLANAHAN.—That is our main case, your Honor.

Testimony of A. D. Jones, for Respondent.

A. D. JONES, called for the respondent, sworn.

Mr. SUTRO.—Q. Mr. Jones, what is your business? A. I am a wharfinger.

Q. Whereabouts, Mr. Jones?

A. Near Richmond, at a place called Point Orient Wharf.

Q. For whom are you a wharfinger?

A. The Standard Oil Company.

Q. How long have you been there?

A. 15 years in June.

Q. Do you recollect the schooner "Commerce" coming up there to the Point Orient Wharf in September 1919? A. I do, yes sir.

Q. Do you know Captain Anderson, of the "Commerce"? A. Yes, I do.

Q. Did you see the "Commerce" come up about September 16, 1919, to the Point Orient Wharf?

A. Yes, sir.

Q. Did you see her dock? A. Yes, sir.

Q. Where did she dock?

A. She docked in what we call Berth 3. [102]

Q. And when she docked, where were you?

A. I was over at Berth 1.

Q. Did you see the captain soon after she docked?

A. Yes, sir.

Q. About how long after?

A. Well, it was before lunch, before 12 o'clock.

Q. About an hour or two after she came in?

A. Well, no; she came in after eleven o'clock, if I remember correctly.

(Testimony of A. D. Jones.)

Q. Then it was about an hour or so after she came in?

A. It was between 11 and 12 when he came over to the office.

Q. Did the captain stay around the wharf that day, or what did he do?

Mr. McCLANAHAN.—I object to the question as leading.

The COURT.—Q. What did the captain do?

A. The captain got an automobile and went into town.

Mr. SUTRO.—Q. When you say he went into town, what do you mean?

A. He went toward Richmond; where he went, I could not say.

Q. Did he have any conversation with you prior to the time that he went?

A. He came over to the office, and we had the usual greetings, talking; I don't know that any particular thing was said, except I might have asked him how his health was, or something like that.

Q. At that time, Mr. Jones, will you state to the Court whether there was a strike on among the stevedores?

A. This was on a Tuesday, if I remember correctly, and I think there was a strike called on a Monday; I am not positive about that.

Q. At any rate, when he was up there there was a stevedores' strike on, was there not?

A. Yes, sir.

(Testimony of A. D. Jones.)

Q. Will you state whether or not the "Commerce" had steam in her donkey at the time she arrived there?

A. I could not say; [103] I didn't see any steam.

Q. Do you know whether there was any crew?

A. No, I don't think there was anybody on board, except the captain, and a mate, and possibly a watchman, or something like that.

Q. Was there a gear-rig there?

Mr. McCLANAHAN.—I object to that as immaterial. That raises the question as to what is a vessel ready to load.

Mr. SUTRO.—I submit the question to your Honor.

The COURT.—Let it go in the record.

Mr, McCLANAHAN.—Exception.

A. Well, I could not say whether there was any gear rigged, or not; I didn't see any gear, anyway.

Mr. SUTRO.—Q. Did you go aboard the ship that day the captain spoke to you, Mr. Jones?

A. No, sir, I did not.

Q. Did you ever examine the dunnage of that ship?

A. I might have went aboard the ship and looked down the hold, but I didn't go down in the hold.

Q. Did you ever examine the dunnage?

A. Only from deck.

Q. Did you ever examine the dunnage for the purpose of making an examination of it?

(Testimony of A. D. Jones.)

A. I did before she started to load, yes, sir.

Q. That is, the second time?

A. When she started to load, yes.

Q. You mean when she started to load in November, 1919? A. That same year, yes, sir.

Q. That was over a month and a half after she arrived there first, wasn't it?

A. Yes; she was there seven or eight weeks, or something like that; I don't remember exactly.

Q. But prior to that time, you had never examined the dunnage?

A. Not unless I looked from the deck. I didn't go down in the hold.

Q. Prior to that time, did you ever say any words to this effect. [104] or anything of a similar nature: "That is the finest dunnage I ever saw laid in this country?"

A. I might have said, "The dunnage looks fine, Captain," or something like that.

Q. I mean prior to the time when you examined her when she loaded; had you ever said anything like that then?

A. I say I might have looked down in the hold and said, "Captain, the dunnage looks fine," or something like that. I don't remember anything about it.

Q. It was casually looking into the hold?

A. Yes.

Q. Did he ever make any remark to you, when he arrived there, to the effect that the "Commerce" was ready to load?

(Testimony of A. D. Jones.)

A. The latter part of the week before he came up, he called me up and—

Q. No, I mean when he arrived, the day he got there, did he come to you and say, "The 'Commerce' is ready to load?" A. No.

Mr. McCLANAHAN.—And there is no such evidence in the record.

Mr. SUTRO.—Q. Did he make any remark of that kind to you four or five days after he was there?

A. Well, he was there for a long while, you know.

Q. I mean within the first four, or five, or six days, did he make any such remark to you?

A. None that I remember, no, sir.

Q. About three weeks or so after the "Commerce" had arrived there, do you remember receiving a telephone message from somebody purporting to telephone from Sanders & Kirchmann's office? A. Yes.

Q. What was it?

A. There was a lady called up and asked for the captain.

Q. What did she say, that she was from Sanders & Kirchmann's office? A. Yes, sir.

Q. And what did you say?

A. She asked for the captain, and I told her that the captain was not on board the ship.

Q. You say that was about three or four weeks after the "Commerce" [105] had come up?

A. That was after the ship was shifted over into

(Testimony of A. D. Jones.)

what we call Berth 2; I don't recall how long that was.

Q. We can fix that date later; it was right after that, was it? A. Yes, sir.

Q. Did she ask you to leave word for him?

Mr. McCLANAHAN.—I object to that as leading.

Mr. SUTRO.—Q. What did she ask you to do, so far as the captain was concerned?

A. She asked me to have the captain report to their office.

Q. Did the captain thereafter come back to Point Orient Wharf?

A. I don't know whether he came back, or whether he called up, but anyway, word was gotten to him to call up his people.

Q. Did you see him after that?

A. He came back over to the ship, yes.

Q. How soon afterwards?

A. It might have been two or three days, or something like that.

Q. Did you have any conversation with him?

A. Yes, sir.

Q. What did he say?

A. Well, he said several things. It was the usual conversation, I guess. The main thing he said was, he was afraid he was going to lose his charter.

Q. Do you recall the words he said?

A. Yes, he said that somebody in the office pulled a bloomer and didn't attend to the ship.

Q. By "pulled a bloomer," what did he mean?

(Testimony of A. D. Jones.)

A. I suppose he meant they did not attend to the ship.

Q. Did not attend to the ship, in what way?

Mr. McCLANAHAN.—I object to that, your Honor.

Mr. SUTRO.—I want him to explain that expression, "pulled a bloomer."

The COURT.—Proceed.

Mr. SUTRO.—Q. Did he ever ask you for any cargo, prior to [106] the time that she loaded in November, Mr. Jones? A. No, sir.

Q. Did he ever complain to you, prior to that time, that she was not getting any cargo?

A. The cargo was there.

Q. I say, did he ever complain to you that she was not getting any? A. No, sir.

Mr. SUTRO.—That is all.

Cross-examination.

Mr. McCLANAHAN.—Q. You are connected with the Standard Oil Company, are you?

A. The Standard Oil Company of California, yes, sir.

Q. What is your official title, if you have any?

A. Wharfinger, so far as I know.

Q. Are you the head wharfinger there?

A. I have charge of the wharf, yes.

Q. And the head man at Point Orient? A. Yes.

Q. You have loaded a good many of these schooner ships? A. Yes.

Q. Tell the Court how it is done, the process of

(Testimony of A. D. Jones.)

taking the cargo that is there in case oil and getting it on the ship, what takes place?

A. It all depends on the size of the ship, and the condition of the ship.

Q. I am not speaking of the ship now; I want to know what you do with the cargo.

A. The cargo is delivered to the ship's tackles; they can do as they please about getting it on board.

Q. Who delivers it to the ship's tackles?

A. We do.

Q. And by "we" you mean the Standard Oil Company? A. Yes, sir.

Q. It is at a warehouse, I suppose, isn't it?

A. Yes.

Q. And how do you get it to the ship's tackles?

A. We usually have conveyors for cases, and the barrels we roll.

Q. You roll the barrels and you have what you call case conveyors that you use when it is in the tins? A. Yes, sir.

Q. What method is used to convey the oil, when it is in cases, [107] from your warehouse to the ship? A. Conveyors.

Q. How do you handle the conveyors?

A. Pick them up with your hands and put them on the conveyors.

Q. And how do you handle the conveyors?

A. The cases roll right along; the conveyors are ball-bearing rollers, on which the cases roll.

Q. They roll on the ball-bearing apparatus right to the ship's tackle? A. Yes, sir.

(Testimony of A. D. Jones.)

Q. And it is from there the ship takes them?

A. Yes, sir.

Q. These cases of petroleum products in your warehouse there are of different brands, aren't they?

A. Quite often, yes.

Q. You have the brand stamped on the outside of the case?

A. Surely, each kind of oil is always marked.

Q. Branded? A. Surely.

Q. Where do you get your instructions when you are to furnish a cargo for a vessel, and it is case oil, where and from whom do you get your instructions with reference to the different brands that are going to be used in that particular shipment?

A. There are always orders issued on each particular shipment.

Q. Issued by the Standard Oil? A. Yes.

Q. To you? A. Yes.

Q. And you would get a copy of those orders?

A. Yes.

Q. And that is your guide in picking out of your warehouse the different brands of oil for the waiting ship: Is that right?

A. Yes. I don't have a stock on hand, the goods are sent out as they are ordered.

Q. Sometimes, however, you have stock in your warehouse, haven't you?

A. We arrange cargoes for ships that are coming up, yes.

Q. When a ship, then, has reached your dock for

(Testimony of A. D. Jones.)

loading, it is a [108] fact that you sometimes have not the cargo there for her? A. Yes.

Q. And the cargo has to be sent from where to Point Orient to make the shipment?

A. From a place called Richmond, about three miles from Point Orient.

Q. Three miles? A. Three or four.

Q. Do you remember loading the "Commerce" when she loaded in November, 1919?

Mr. SUTRO.—I object to that upon the ground that it is not material, so far as this charter-party in issue here is concerned.

The COURT.—He may answer.

Mr. SUTRO.—Exception.

A. Yes, I remember the ship loading.

Mr. McCLANAHAN.—Q. Was the cargo that was loaded on the "Commerce" at that time on hand at the Point Orient dock, or was it brought from Richmond?

Mr. SUTRO.—I object to that as immaterial, irrelevant and incompetent. It is entirely immaterial, your Honor. The material fact in this connection, if there is anything in this line of question at all, is where the cargo was for the "Commerce" for this voyage we are now speaking about here. It doesn't make any difference where the cargo for the second voyage was, whether it came from Richmond, or from the south, or from anywhere else. It cannot possibly affect this issue.

The COURT.—Let it go on the record.

(Testimony of A. D. Jones.)

Mr. SUTRO.—Exception.

A. Do you mean the cargo that was loaded for the trip when she laid there so long, or for the following cargo

Mr. McCLANAHAN.—Q. I mean the cargo she loaded after laying there so long; that was in November, 1919.

A. I could not recall exactly whether the entire cargo was there.

Q. Do you think it was all there?

A. I would say that there [109] was 90 per cent of it there, anyway.

Q. And the balance had to come from Richmond?

A. You understand that on most cargoes we have a leeway; we usually try and decide how much a ship will carry, so as to get that amount out there, and not to get too much out there.

Q. So as not to interfere with the work as it goes on? A. With other freight coming in.

Q. Do you remember when the "Commerce" first arrived at the Port Orient dock, whether you had there at that time her cargo, or any part of it?

A. We had the larger part of it; I cannot remember exactly how much of it.

Q. But not all of it?

A. As I say, we had at least 80 or 90 per cent of it.

Q. And you used, then, for the second charter-party, the cargo that was intended for the first?

A. Well, as far as I know, it is all one charter; I don't know anything about the charter.

(Testimony of A. D. Jones.)

Q. Then I will put it this way, Mr. Jones: The stock of case oil that was in your warehouse at the time, which was intended for the "Commerce" when she first arrived there, was finally used when she did ultimately load?

Mr. SUTRO.—I submit that that is entirely immaterial to the issue.

The COURT.—Let him answer, if he knows.

A. As far as I know. I don't remember if that is so. I suppose it did, yes.

Mr. McCLANAHAN.—Q. As far as you know?

A. Yes.

Q. Do you remember the brands of oil that went on the "Commerce." A. No, sir.

Q. What other vessel were you loading at Point Orient when the "Commerce" first got there?

A. We were not loading anything [110] in Berth 3. I might have had what I call a tanker in Berth 1, but I don't remember the name.

Q. Don't you remember that the "Luzon" was there? A. At Point Orient?

Q. No, the "Jewett"; don't you remember that the schooner "Jewett" was there?

A. I don't remember. The "Jewett" loaded there about that time, but whether she was there at this particular time, I could not say.

Q. Don't you remember that the "Jewett" loaded there at the time of the strike?

A. Yes; they loaded with union stevedores, I believe.

(Testimony of A. D. Jones.)

Q. They loaded with union stevedores?

A. Yes, sir.

Q. How did the "Commerce" load in November, 1919?

A. I don't remember whether the strike was over when she loaded, or not.

Q. With what stevedores did she load, union or non-union?

A. As I say, I don't remember whether the strike was over then, or not; I don't remember whether they used union or non-union men.

Q. You don't remember whether stevedores were available, do you, at the time the "Commerce" came there?

A. Well, I know the "Jewett" loaded there.

Q. She was loaded? A. Yes.

Q. You don't remember whether you could or could not have gotten other stevedores?

A. No, I don't know anything about that; I have nothing to do with that.

Q. Do you know, between the time of the arrival of the "Commerce" and your inspection of her dunnage just prior to her loading, whether any other dunnage was put on the vessel?

A. No, I could not answer that.

Q. Do you know whether any change was made in the vessel during that period of her lying there?

A. I think the captain and one [111] man was aboard most of the time; I don't know what they were doing; they might have been changing the dunnage, for all I know.

(Testimony of A. D. Jones.)

Q. You don't know of any change, do you?

A. Not that I remember particularly, no, sir.

Q. Do you know what is the duty of a stevedore after taking charge of a cargo which has been delivered at ship's tackles?

Mr. SUTRO.—I submit that that is calling for the conclusion of the witness.

Mr. McCLANAHAN.—I am not asking for a conclusion, I am asking for a fact.

The COURT.—Let him answer.

A. What is the question?

Mr. McCLANAHAN.—Q. Do you know what he does after he has had the cargo tendered to him at the ship's tackles?

A. You mean the foreman?

Q. The foreman and his gang, what do they do with the cargo? A. They load it on the ship.

Q. They load it on the ship? A. Yes, sir.

Q. The crew doesn't load it, does it?

A. No, sir.

Redirect Examination.

Mr. SUTRO.—Q. So far as the identity of the cargo is concerned which finally went on the "Commerce" when she loaded in November, 1919, you do not pretend to say whether or not that is the same cargo that was there when she first came up on September 16, 1919, do you?

A. I said I don't remember.

Testimony of C. M. Connolly, for Respondent.

C. M. CONNOLLY, called for the respondent, sworn.

Mr. SUTRO.—Q. Mr. Connolly, what is your business? A. I am labor foreman.

Q. Where?

A. At the Point Orient Wharf. [112]

Q. Of the Standard Oil Company?

A. The Standard Oil, yes.

Q. How long have you been there?

A. Sixteen years next December.

Q. Do you recall the schooner "Commerce" coming up there to that wharf on September 16, 1919, about that time? A. Yes, about that time.

Q. Were you there when she docked?

A. Yes, sir.

Q. Do you remember ever having seen the captain of the "Commerce" before that time?

A. No, I don't suppose I ever saw him in my life.

Q. Did he make any remark of any kind to you when the ship was put alongside the dock, with reference to her being ready to load?

A: Not anything specially that I can remember. If you call off such a thing, I might try to recollect it.

Mr. McCLANAHAN.—I would suggest that you ask what he said to him, Mr. Sutro, and not lead the witness.

Mr. SUTRO.—I have not asked him the question, yet.

The COURT.—Proceed.

(Testimony of C. M. Connolly.)

Mr. SUTRO.—Q. Did he say to you, "The ship is ready to load," or words to that effect, or of a similar import, or anything of that kind?

Mr. McCLANAHAN.—I object to the question as leading, and also as having been answered; it is the same question that the witness has just answered.

Mr. SUTRO.—I don't think he has.

The COURT.—He may answer it.

A. No, sir.

Mr. SUTRO.—Q. Did you go on the ship right after she arrived to examine the dunnage?

A. No, I did not examine the dunnage. I am vested with no authority to examine dunnage.

Q. Have you ever received from any ship captain, notice of readiness to load: Is that your business, to receive such notices? [113]

A. That is not my business, no.

Q. Did you ever receive such notices?

A. No. It would be unusual if I did, and I would remember it. I don't think I ever did, because—

Q. Do you remember where the captain went after the "Commerce" docked?

A. No, I don't know that.

Q. Mr. Jones testified, and you heard his testimony here in court, didn't you?

A. I heard some of it; I don't hear very well; I was sitting in the back, there.

Q. He testified about a conversation that Captain Anderson had with him some three or four

(Testimony of C. M. Connolly.)

weeks after the "Commerce" had arrived at Point Orient. He said that Captain Anderson had told him that somebody had slipped a bloomer, or made a mistake, and they were going to lose the charter?

A. Yes, I was there, but whether it occurred in the office or outside the office, that I don't remember.

Q. What did you hear? Tell the Court what you heard.

A. Well, as far as I remember, he was out of sorts, the old captain was, and whether it was as I am speaking now, word for word, I don't remember that, but I remember he said, "It looks as though they would lose the charter, because somebody has made a mistake," or "pulled a bloomer"—maybe that is the expression he used. That is all I ever heard him say about it.

Q. Did he say how they had made a mistake?

A. No.

Q. You didn't hear that? A. No.

Q. Did he ever ask for any cargo for the "Commerce"? A. No—

Mr. McCLANAHAN.—Just a minute. I object to that as immaterial.

The COURT.—The question is answered.

Mr. SUTRO.—Q. How far away from the "Commerce" was the oil [114] in the cases at the time that she docked?

A. I won't be much out if I say 14 feet from the ship's side.

Q. There was a warehouse there? A. Yes.

(Testimony of C. M. Connolly.)

Q. And the cargo intended for her was in the warehouse?

A. Yes, the "Commerce's" cargo was in the warehouse when she got there.

Q. Do you recall seeing the donkey engine on the "Commerce" when she came up?

A. Well, of course, I have seen it many times; I don't just remember it the very minute she came up.

Q. Was there steam in the donkey?

A. That I would not swear to.

Q. Did you know anything about the dunnage in the "Commerce," did you know whether it was good or bad?

A. No; as I say, if I had, I would have held it to myself, because I am not vested with the authority to pass on the dunnage; that is not my business.

Mr. SUTRO.—That is all.

Cross-examination.

Mr. McCLANAHAN.—Q. Mr. Connolly, you assisted in tying the vessel up to the dock, did you not? A. Yes.

Q. Is that a part of your duty?

A. If I have men that are engaged elsewhere, and I can do some good once in a while in giving a hand, I do so, yes.

Q. Did you go on the ship after that?

A. Many a time after that, but just when, I do not know.

Q. You spoke of having remembered a conversation that Mr. Jones testified to; were you a party to that conversation? A. No, just a listener.

(Testimony of C. M. Connolly.)

Q. Where were you, how close?

A. Well, by feet, I could not say, but I must have been close enough to hear.

Q. You heard it, did you? A. Yes, sir.

Q. Tell us what you heard, as you remember it?

A. Well, as I said before, the captain seemed to be out of sorts, and— [115]

Q. I am not asking you how the captain seemed, I want the conversation that you heard.

A. And he said something about being afraid they were going to lose the charter, because somebody, as I say, either made a mistake or pulled a bloomer—I forget just the expression.

Q. He said that somebody pulled a bloomer?

A. Very likely, as that is the expression that comes to me.

Q. Who uses that expression?

A. The captain.

Q. Had you ever heard that before?

A. Oh, yes, I had heard it before.

Q. Is it a common expression?

A. Yes, it is a common expression.

Q. Who is it used by?

A. Well, in other words, a man making a mistake.

Q. I say, who is it used by? A. Used by?

Q. Yes, that expression, "pulled a bloomer."

A. You mean who invented the expression?

A. No, who uses it, after it was invented?

A. A man who uses slang.

Q. The captain of the "Commerce" was a Norwegian, wasn't he? A. Yes.

(Testimony of C. M. Connolly.)

Q. Spoke English rather badly, didn't he—broken English?

A. Well, something like many of the old Norweigian or Swedish skippers around there do. I don't know that he was any worse or any better.

Q. You have said on your direct examination that the cargo for the "Commerce" was in the warehouse? A. Yes, sir.

Q. You mean when she first arrived there?

A. Yes.

Q. All?

A. I could not say that all of it was, but there was the biggest part of it, I know that.

Q. Did you have anything to do with the cargo that is in the warehouse for a waiting ship?

A. Yes, when I receive the [116] orders to give that ship the cargo, I see that my men get the cargo to the ship's side in reasonably quick time to give good service; that is my business.

Q. From whom do you get your orders to make that kind of a delivery?

A. Mr. Jones is the wharfinger, and I look to him for my orders.

Q. Did you get any orders to that effect when the "Commerce" first came to the dock at Point Orient? A. No, sir.

Q. The first time you got orders to furnish a cargo for the "Commerce" was when she loaded in November, later on?

A. I would naturally give her the cargo if I was

(Testimony of C. A. Blumer.)

given the order; when she did take the cargo, I got the order to give it to her, yes, sir.

Mr. McCLANAHAN.—That is all.

Testimony of C. A. Blumer, for Respondent.

C. A. BLUMER, called for the respondent, sworn.

Mr. SUTRO.—Q. Mr. Blumer, what is your business?

A. Agent for the Vacuum Oil Company, Pty., Ltd.

Q. Were you such agent in August, of 1919, and from thence on continuously until the present time?

A. Yes.

Q. Do you recall having a conversation with Mr. Kirchmann, Sr., of Sanders & Kirchmann, Inc., on the floor of the Merchants Exchange, along about the beginning of September, in the fore part of September, 1919?

A. In the early part of September.

Q. Do you recall having a conversation with him about the "Commerce" at that time?

A. Yes, sir.

Q. As nearly as you can, Mr. Blumer, fix that date, when was it?

A. On the Friday before she went up, as nearly as I can remember, because I don't come on the Merchants Exchange floor on Saturday.

Q. She went up on the 16th, it seems; so that would have been on [117] Friday, the 12th of September, 1919, as nearly as you can recollect?

(Testimony of C. A. Blumer.)

A. Yes.

Q. Will you please state to the Court what that conversation was?

A. Mr. Kirchmann said that the "Commerce" was on the dry-dock, and he wished, if possible, to save the expense of an extra towage, and if I could oblige him by telling him where the cargo was he would appreciate it, so that he could have her moved from the dock to where the cargo would be loaded, or where it was intended to load her, and that he might tow her up on Sunday. That is why I placed it roughly on Friday, because I don't go to the Exchange on Saturday.

Q. What did you say?

A. I told him I would find out, and I telephoned to Mr. Slingerland's department, probably to Mr. Slingerland, himself, I don't remember, but I found the cargo was on the Point Orient Wharf, and I telephoned Mr. Kirchmann to that effect.

Q. That is all you said to him in that regard?

A. Yes.

Q. Do you recall a visit to your office on the following Monday from Mr. Kirchmann, Jr., and Captain Beattie, of the "Luzon"? A. Yes.

Q. Had you met Captain Beattie before that?

A. No, I think not.

Q. I show you a letter, Mr. Blumer, and ask you if you recognize that letter? A. Yes.

Q. While counsel is looking at it, I would like to see the letter of September 4th, from Mr. Slinger-

(Testimony of C. A. Blumer.)

land, in which he notified Sanders & Kirchmann that they were to make their inquiries from Mr. Blumer. I show you a letter which has been marked Respondent's Exhibit "A," and ask you if you recognize that. A. Yes.

Q. Is that a copy of a letter which you received from Mr. Slingerland? A. Yes.

Mr. SUTRO.—Now I offer in evidence a letter from Sanders & [118] Kirchmann to Mr. Blumer, dated July 15, 1919, which reads as follows:

Respondent's Exhibit "G."

(Letter-head of Sanders & Kirchmann, Inc.)

"San Francisco, Cal., July 15th, 1919.

Mr. C. A. Blumer,
Mills Building,
San Francisco.

Dear Sir:

Have for acknowledgment your favor of the 14th inst., in reference to agency commission in connection with Schooner 'Luzon' at Wellington, N. Z.

We have heard nothing from our master from New Zealand in reference to this, although we have his settlement account from there.

Clause 15 of the Charter Party provides for agency fee of 2½%, but this is specifically stricken out in the Charter-Party and it was not one of the conditions that vessel was to pay an agency fee.

In any event, we must await the arrival of our

(Testimony of C. A. Blumer.)

captain here before we can take this up further with you.

Yours truly,
SANDERS & KIRCHMANN, INC.,
By H. KIRCHMANN,
Secretary."

(The document was marked Respondent's Exhibit "G.")

Q. Thereafter, and pursuant to the advice in that letter, that they are awaiting the captain's arrival before they can take the matter up further with you, do you recall whether or not the captain called on you?

A. No, he did not, until he came with Mr. Kirchmann.

Q. When did he come with Mr. Kirchmann?

A. On the 16th of September.

Q. At that conversation, was the schooner "Commerce" in any wise mentioned? A. No.

Q. Did Mr. Kirchmann, Jr., make any remark of any kind or nature [119] to you concerning the readiness of the schooner "Commerce" to load—in that conversation?

A. None whatever, so far as I am aware.

Q. Did Sanders & Kirchmann, Inc., or Wolff, Kirchmann & Co., or Henry Kirchmann, Jr., or anybody for the "Commerce," ever make any demand on you, the Vacuum Oil Co., Pty., or anybody, so far as you know, for any demurrage on account of the "Commerce" after the purported notice of readiness to load had been given to you? A. No.

(Testimony of C. A. Blumer.)

Q. When did the lay-days under that charter commence?

A. Well, they would commence when she had given notice of readiness to load and been accepted.

Q. Did they ever complain to you, or communicate with you after the 16th day of September, 1919, on which day it is claimed that verbal notice of readiness to load was given to you, or in any wise make any suggestion to you, either verbally or in writing, that the "Commerce" was lying at Point Orient and waiting to receive a cargo?

A. No, not prior to the cancellation.

Q. Mr. Blumer, there was introduced in evidence here a surveyor's certificate; how long have you been in the shipping business?

A. Nearly 20 years.

Q. What is the object and purpose of a surveyor's certificate?

Mr. McCLANAHAN.—I object to that question as being indefinite. I know something about surveyors' certificates, they are very numerous. I do not think the witness can answer that question unless it is made more definite. I certainly cannot understand it.

Mr. SUTRO.—I will take a ruling on the question.

The COURT.—It is rather indefinite.

Mr. SUTRO.—You say it is indefinite, your Honor?

The COURT.—Yes, rather indefinite. [120]

Mr. SUTRO.—Q. A surveyor's certificate, as I

(Testimony of C. A. Blumer.)

understand it, is a certificate that a vessel is seaworthy: Is that a fact? A. Yes, sir.

Q. And that she is in condition to receive cargo?

A. Yes.

Q. Has the surveyor's certificate got anything to do with the notice of readiness to load?

A. No, not altogether; the notice of readiness to load, without the surveyor's certificate—you might ask for the surveyor's certificate if you have the readiness, but the surveyor's certificate without the readiness to load is of no value.

Q. In this charter, there is contained a cancellation privilege; at the time this charter was made, Mr. Blumer, were those rates high or low?

A. Exceptionally high.

Q. Is that cancellation certificate considered a valuable privilege amongst shipping people?

A. Certainly.

Q. Explain to the Court why it is.

A. There are many contracts, contracts of sale made with the stipulation for shipment within a given time, and the party to the sale may make a charter, and he will protect himself in the same way, that if a vessel does not tender at a certain time the charter may be cancelled; or, rates may drop, and he wants to protect himself in those rates, and the charter is made accordingly.

Q. Is it a customary clause in a charter?

A. I have never seen a charter without it.

Q. Do you know whether when this notice of cancellation which you gave and which has been intro-

(Testimony of C. A. Blumer.)

duced in evidence here, do you know whether at that time Sanders & Kirchmann had other vessels lying in this harbor which were idle and for which they were the managing owners or the agents for the owners?

A. Yes, there were about three others. [121]

Q. Name them? A. The "Luzon" was here.

Q. Where was she?

A. The "Luzon" had loaded her case oil, and she was lying alongside a lumber wharf somewhere.

Q. What else?

A. The "Samar" came in somewhere about between the 20th and the 25th of September; and the "Philippine," within three or four days of the "Samar." They both came in loaded with copra. I understand they remained idle in the stream. The "Luzon did not start loading until after that cancellation notice was sent in on the "Commerce."

Q. At that time, was there a stevedore strike on in this harbor?

A. Yes, I understood there was.

Q. Had you ever seen either Connolly or Jones, or had any communication with them in any wise until after this controversy arose?

A. Not that I remember.

Q. Had you in any way, by oral declarations, or in writing, appointed them, or either of them, your agent or the agent of the Vacuum Oil Company?

A. No, certainly not.

Q. Had either of them, in any way, so far as you

(Testimony of C. A. Blumer.)

know, for any purpose whatever, ever represented the Vacuum Oil Company. A. No.

Q. Do you know where the second charter,—and this is simply for the information of the Court—was negotiated?

A. On the floor of the Merchants' Exchange.

Q. Was it done in my office? A. No.

Q. Do you recall the interview in my office?

A. Yes.

Q. That interview was for the purpose of trying to reach a compromise between the parties, was it not? A. Yes.

Q. Do you recall receiving a wire from me from Portland? A. Yes.

Mr. McCLANAHAN.—Are you going to introduce this wire?

Mr. SUTRO.—Yes. It is a part of the entire compromise negotiation. You opened the door for it. [122]

Q. Is that the wire that you received? A. Yes.

Mr. SUTRO.—I shall testify afterwards that Mr. Denman, representing the owners of the "Commerce" stood by me and saw me dictate that telegram, and told me he would send a similar one.

I offer this in evidence.

Mr. McCLANAHAN.—It is objected to as immaterial, irrelevant and incompetent, and outside of the issues in this case; it cannot bind the parties to this action, especially the libelant.

The COURT.—Read it into the record.

Mr. SUTRO.—It is as follows:

(Testimony of C. A. Blumer.)

Respondent's Exhibit "H."

(WESTERN UNION TELEGRAM.)

"1919 Oct 28 AM 11 13

"Portland Org 1055 A 28

C A Blumer
Mills Bldg
San Francisco Calif

Commerce After conference with Denman we agree vessel should be rechartered on basis which includes settlement dispute over prior charter In other words each side should give and take in making rate for recharter Denman sending similar wire to Kirchmann.

ALFRED SUTRO."

(The document was marked Respondent's Exhibit "H.")

Q. And it was in pursuance of that telegram that we met in my office and endeavored to compromise the dispute which had arisen between the parties?

A. Yes.

Q. And nothing come from that conference, did it? A. No.

Q. And the parties left my room without agreeing? A. Yes.

Mr. McCLANAHAN.—That is very leading.

Mr. SUTRO.—Q. Well, did the parties agree in my room? A. No.

Mr. McCLANAHAN.—I object to these leading questions, your Honor.

(Testimony of C. A. Blumer.)

The COURT.—He has already covered that. [123]

Mr. SUTRO.—Very well, your Honor.

Q. I want to show you a letter and ask you if you recognize it. A. Yes.

Q. You received that letter? A. Yes.

Mr. SUTRO.—We offer this letter in evidence. It is a letter from S. G. Casad, R. N. S.—Mr. Slingerland's initials— to Mr. Blumer, dated October 7, 1919.

Mr. McCLANAHAN.—We object to the offer on the ground it is immaterial, irrelevant and incompetent, hearsay, a communication between parties that cannot possibly bind the libelant in this case.

Mr. SUTRO.—I submit to your Honor that it is after the letter of September 4th from Mr. Slingerland to these gentlemen that all communications regarding the vessel and the charter are to be made to Mr. Blumer.

The COURT.—To whom is the letter addressed?

Mr. SUTRO.—To Mr. Blumer.

The COURT.—The objection is sustained.

Mr. SUTRO.—I will withdraw it temporarily; it may be that perhaps I can introduce it through Mr. Slingerland.

The COURT.—That may be.

Mr. SUTRO.—I realize the rule, your Honor; I do not want to put in any improper evidence.

The COURT.—Anything between these parties would not bind the other side.

Mr. SUTRO.—Except this, your Honor: He had

(Testimony of C. A. Blumer.)

given notice on September 4th, well, I won't argue the matter now. That is all.

Cross-examination.

Mr. McCLANAHAN.—Q. Are you the agent under authority of the Vacuum Company?

A. The Vacuum Company, Pty., Ltd.

Q. Is your answer "Yes"?

A. The Vacuum Oil Company, Pty., Ltd., [124] not the Vacuum Company.

Mr. SUTRO.—That is a perfectly proper answer, Mr. McClanahan, because there are two companies, the Vacuum Oil Company, Pty., Ltd., and the Vacuum Oil Company.

Mr. McCLANAHAN.—Q. Well, add "Proprietary, Limited," to the question and then answer the question. A. Yes.

Q. Are you the agent under written authority?

A. Yes.

Q. When were you appointed under the written authority? A. Early in 1919.

Q. And where were you? A. In Australia.

Q. And you came here to undertake the agency?

A. Yes.

Q. Did you have any special authority for canceling this charter-party in question?

A. It did not require it.

Q. Did you have any? A. No.

Q. You did it on your own authority?

A. I did it on the power that I held.

Q. Did your principals know that you were going to cancel this charter-party? A. Yes.

(Testimony of C. A. Blumer.)

Q. Did you advise them of that fact?

A. No, my principals didn't—

Q. You cancelled the charter-party without advising them of the cancellation, did you? A. No.

Mr. SUTRO.—Just a minute: I submit that that is immaterial. And the witness evidently did not finish his answer.

The COURT.—The question is answered.

Mr. SUTRO.—Well, I didn't get a chance to object.

Mr. McCLANAHAN.—I can't control your witness, you know.

Mr. SUTRO.—I am not blaming the learned counsel; far be it from me.

The COURT.—Proceed.

Mr. McCLANAHAN.—Q. Where are your principals?

A. There is [125] a director of the company in New York; the others are in Australia.

Q. With whom did you communicate?

A. I communicated with either, or both.

Q. In the matter of cancelling a contract made prior to your agency, with whom would you communicate?

Mr. SUTRO.—I object to that on the ground it is not material.

The COURT.—Sustained.

Mr. McCLANAHAN.—Q. Is it your idea, Mr. Blumer, that a notice of readiness of a ship to receive cargo has to be accepted? A. Certainly.

(Testimony of C. A. Blumer.)

Q. And it is your idea that that notice must be in writing? A. Not necessarily.

Q. Not necessarily?

A. No, but it must be accepted.

Q. It has to be accepted? A. Certainly.

Q. And it is of no value except accepted?

A. How would you date your demurrage if it was not?

Q. Answer my question, please.

Mr. SUTRO.—Just a minute: I object to the question on the ground it is calling for a hypothetical condition of facts; it is immaterial and of no consequence or importance in this case.

The COURT.—Sustained; I don't think it is in issue here. He did say that it was for the purpose of demurrage.

Mr. McCLANAHAN.—Q. You knew, Mr. Blumer, that the "Commerce" had proceeded to Point Orient for her cargo?

A. I don't know that I knew, only from hearsay, probably. I was not so particularly interested.

Q. Did you take a disinterested view of that matter?

A. It was time enough for me to take an interested view when she was tendered to me.

Q. So, until the notice of readiness was tendered to you, you [126] were not particularly interested? A. No.

Q. Then you want to on oath testify that you did not know when the "Commerce" went to Point Orient, do you?

(Testimony of C. A. Blumer.)

Mr. SUTRO.—The witness is under oath; I think the question is improper.

Mr. McCLANAHAN.—Well, I will strike out the part about being under oath.

A. What is your question?

Mr. McCLANAHAN.—Read the question.

(Question read by the reporter.)

A. No, I didn't infer that I did not know when she went.

Q. I am asking you if you knew when she went.

A. I told Mr. Kirchmann where the *cargo, and* I understood she was going up some time about the week end. He wanted to save towage expenses. I infer she went up. I didn't worry about whether she went, or not.

Q. As a matter of fact, you were not anxious to load her, were you? A. No particular anxiety.

Q. Prior to that, you had been after ships very eagerly, were you not, prior to September 16th?

Mr. SUTRO.—I object to the question on the ground that it is not material.

The COURT.—Sustained.

Mr. McCLANAHAN.—Q. Did you ever make any attempt to ascertain whether the schooner "Commerce" had proceeded to and had arrived at the dock that you designated for her to go to?

Mr. SUTRO.—I object to the question as immaterial, whether he did or not.

The COURT.—He may answer it.

A. I did not designate a dock where she was to go. I told the owner of the vessel where the cargo

(Testimony of C. A. Blumer.)

was. He could make his own [127] arrangements about going there. He wanted to save towage expenses, and as a business courtesy I wanted to assist him as much as possible. He must look after his own contract; it is my duty to look after my part of it.

Mr. McCLANAHAN.—Q. Was it your duty to designate a loading berth? A. Not necessarily.

Q. Not necessarily?

A. No, because he did not tender the ship.

Q. He did not tender the ship when you received the surveyor's certificate?

A. No, he did not tender the ship.

Q. And you did not know from that surveyor's report or certificate that the ship was ready for your cargo?

A. How could I, because she was on the dry-dock?

Q. Because it states so.

A. No, it does not; pardon me, it does not say she is ready for cargo.

Q. "Is fit to receive cargo."

A. That is a different thing.

Q. You didn't know when you received that certificate, that the vessel was proceeding to Point Orient as the designated port of loading?

A. I received that certificate after I had told Mr. Kirchman where the cargo was; that certificate merely indicated to me that the repairs were finished, and that the vessed was seaworthy.

Q. And fit?

(Testimony of C. A. Blumer.)

A. If she is seaworthy, she is fit.

Q. Fit for the receipt of your cargo?

A. It says "fit for perishable cargo."

Q. Fit for the cargo intended for this voyage?

A. Yes, fit for anything.

Q. For the intended voyage? A. Yes.

Q. Did you never learn, prior to cancelling the contract, that the vessel had proceeded to Point Orient? A. Oh, yes, I did, certainly. [128]

Q. When did you learn that?

A. When I got a letter from Mr. Slingerland telling me that she was in the road and what was the owner's intention. I said, "Refer to the owner, I don't know anything about it."

Q. As a matter of fact, you didn't want to know anything about it, did you?

A. Certainly, I was not anxious about it.

Q. Mr. Blumer, do you take the position that you have never designated a loading berth for the "Commerce," under the first charter-party?

A. I did not designate the lading berth.

Q. Did Mr. Slingerland have authority to designate it? A. No.

Q. This conversation which you had with Mr. Kirchmann, Sr., on the floor of the Merchants Exchange, was not a conversation which you intended to be a designation of the port of loading?

A. No, it could not be.

Q. It could not?

A. No. It is impossible for a man to tender a

(Testimony of C. A. Blumer.)

ship as ready when she is on the dry-dock; she could not be tendered and accepted on the dry-dock.

Q. I am not asking you about the dry-dock. I am asking you about the loading point. Did you intend that to be a designation of the loading berth?

A. No, I told him where the cargo was. I intended it as he suggested it, to save him two towages, to save him money.

Q. I don't quite get you: What were you trying to save him?

A. I was not trying to save him anything. I was trying to oblige him as an ordinary business courtesy. He was trying to save himself something.

Q. In what way?

A. How do I know? He said he didn't want to make two towages between the dry-dock and the wharf where the cargo was, and if I would tell him where the cargo was, he would make one towage of it. [129]

Q. Did not the contract provide for but two places of loading, San Pablo and Point Orient, and did not Mr. Kirchmann simply ask you at which of those two she was to go? A. No, sir.

Q. I would like to have you explain what he did ask you. He wanted to know where to take the ship, didn't he?

A. He wanted to know where the cargo was.

Q. So that he could take his ship there?

A. He could please himself about that. Yes, he wanted to save a towage, but I would not designate a loading berth until his vessel was ready. I could

(Testimony of C. A. Blumer.)

not accept a vessel as ready when she was on the dry-dock, so I didn't designate the berth. The previous ship will indicate that; you have put in a letter here of a certificate indicating when a vessel left Suva; I would not have anything to do with the vessel or indicate a port until he told me when she left Suva. He said he was ready; I said, "If you are ready, name when you left the last port." In this instance I obliged him.

Q. Your theory and your plan was to refrain from mentioning a place for the loading of that vessel until there had been a tender of the ship as being ready to receive the cargo?

A. No, not necessarily. There is a distinction between my designating the berth and my telling the owner of the ship where the cargo is. He can take his ship there and tender it. That is what I mean. I may be wrong, but that is my idea of it.

Q. What is your idea about the requirement of the charter-party?

A. That it shall be carried out.

Q. With reference to the designation of a berth, did not the charterer obligate himself to designate the berth?

Mr. SUTRO.—The charter speaks for itself.

A. The charter is there.

Mr. McCLANAHAN.—Q. Is it not a fact that between owner [130] and charterer it is the charterer's duty to designate a loading berth?

A. Yes.

Q. And it is then the duty of the owner to take

(Testimony of C. A. Blumer.)

his ship to that loading berth and be prepared and ready to receive the cargo, is it not?

Mr. SUTRO.—I object to the question on the ground that the charter is in evidence, and it speaks for itself.

The COURT.—The charter speaks for itself, and the law fixes the duty or duties of the parties to the charter-party.

Mr. McCLANAHAN.—I am trying to get the plan on which this man works, your Honor.

Mr. SUTRO.—I don't think that makes any difference.

The COURT.—We are not so much concerned about that.

Mr. McCLANAHAN.—Q. Do you want the Court to understand that no place for the loading of the "Commerce," under the first charter-party, has ever been designated?

Mr. SUTRO.—I object to the question on the ground it is immaterial, irrelevant and incompetent, and the charter-party speaks for itself.

The COURT.—I think he has already answered it.

Mr. McCLANAHAN.—I can't understand him, your Honor; I don't know how it is, but I can't understand just what his position is.

The COURT.—Then let him answer it again.

Mr. McCLANAHAN.—Q. Was that meeting on the Merchants Exchange intended for a designation of the loading berth? A. No.

(Testimony of C. A. Blumer.)

Q. Was there ever a designation of the loading berth made by you? A. No.

Q. Did the Standard Oil Company ever have any authority to designate a loading berth for the "Commerce"?

Mr. SUTRO.—I object to the question on the ground that the [131] witness cannot know whether the Standard Oil Company ever had, or not.

The COURT.—Let him answer the question, if he can.

Mr. SUTRO.—Q. Can you answer that question, Mr. Blumer? Did the Standard Oil Company ever have any authority to designate a loading berth?

A. Not from me.

Mr. McCLANAHAN.—Q. After you came here, that was a duty that you assumed under the charter-parties for your company, was it?

A. Well, I just took over the care of the company's business, and that would be incidental to it.

Q. Who was the man to designate a loading port for these vessels?

A. The person to whom the vessel was tendered upon giving notice of readiness; that is tendering.

Q. The notice of readiness to receive cargo must precede the designation of the loading berth?

A. I didn't say that; that is not necessarily so.

Q. Then I ask you again, who is it that must designate the loading berth? A. The charterer.

Q. Did you represent the charterer in this matter of the "Commerce"?

(Testimony of C. A. Blumer.)

A. Yes, but I did not designate the loading berth.

Q. And in your view it never has been designated?

A. The ship never tendered. If an owner put his vessed at a loading berth before he tenders, that has nothing to do with me.

Q. This cargo for this vessel under this charter-party was to be taken on board from the port of Point Orient, wasn't it? A. Yes.

Q. And it was to be received from the Standard Oil Company at Port Orient, wasn't it? A. Yes.

Q. And when the vessel arrived there, the cargo was in the warehouse at Point Orient, wasn't it?

A. Yes.

Q. The cargo for that vessel? A. Yes.

Q. And she was finally loaded with that cargo under her second [132] charter-party?

A. I could not say.

Q. Did you know that the Standard Oil Company was furnishing the cargo for the "Commerce" under her first charter-party? A. Yes.

Q. You knew that? A. Yes.

Q. When did you first definitely know that the "Commerce" was at Point Orient?

A. The first definite word I had was the letter from Mr. Slingerland, saying that she was in the way, and asking if I could indicate the owner's intentions regarding the ship.

Q. What was the date of that notice?

A. I think that was about the—

Mr. SUTRO.—Here is the notice.

(Testimony of C. A. Bluner.)

Mr. McCLANAHAN.—Now, never mind that, Mr. Sutro.

Mr. SUTRO.—He can refresh his memory from it.

The COURT.—If he knows, he can answer the question.

Mr. SUTRO.—I submit that the letter is right here in court, and he can give the date from it.

The COURT.—Let him answer the question.

A. I think about the 7th or 8th of September.

Mr. McCLANAHAN.—Q. Of what?

A. The 7th or 8th of October.

Q. The 7th or 8th of October? A. Yes.

Q. And you did not know before then that the vessel was at Point Orient?

A. You asked me if I knew definitely; that is the only definite date that I can fix.

Q. Where did you think she was during all of that time?

Mr. SUTRO.—I object to the question as immaterial.

The COURT.—Sustained. I think you have already gone over that.

Mr. McCLANAHAN.—I am astounded at this. Perhaps my line of examination is to be criticised by your Honor, but— [133]

The COURT.—No, I would not intimate anything like that.

Mr. McCLANAHAN.—Q. Were you intending to hide yourself from the "Commerce" and all her movements?

(Testimony of C. A. Blumer.)

A. I think the "Commerce" was doing the hiding. I was in my office every day.

Q. She didn't want that favorable charter—is that what you think?

A. I say I was in my office every day.

Q. Mr. Blumer, do you know of any relationship between your company and the Standard Oil Company? A. No.

Q. You do not?

A. Only that of buyer and seller.

Q. You don't know whether they have interlocking directors?

Mr. SUTRO.—I submit that that is a very improper question, it has no bearing in this case.

The COURT.—Sustained.

Mr. McCLANAHAN.—Q. Is the Standard Oil Company furnishing case goods for your company now?

A. I suppose if we wanted them we might be able to get them; I don't suppose they would refuse to sell if we wanted to buy.

Mr. SUTRO.—Q. The same as any other buyer, I suppose? A. Yes.

Mr. McCLANAHAN.—Q. You knew that there had been a very great decline in freight rates?

A. Yes, certainly.

Q. And when you made the second charter-party, it was made at the then prevailing market rates, wasn't it? A. Yes.

Q. And when you made the first charter-party—you didn't make that first charter-party, did you?

(Testimony of C. A. Blumer.)

A. No.

Q. You just found it here among the archives of your company, or did they send it to you?

A. I brought a copy of it with me, or else I received it here; I would not swear to that, when I got it. I held a copy of it.

Q. Did you receive it from the Standard Oil Company?

A. I might have. I received some papers from them. I picked up—[134] the papers of ours that they were holding in connection with some of the vessels; I think that charter was one of them.

Q. Your ground for cancelling this contract was that you had no notice of the ship's readiness to receive cargo? A. Absolutely.

Q. Are you quite clear, Mr. Blumer, in your recollection of the conversation of September 16th?

A. Oh, yes.

Q. You have a good memory, have you?

A. Yes, a good memory for that occasion.

Q. Why for that occasion?

A. Well, because it referred to some accounts which I had written about on several occasions, and Mr. Kirchmann got annoyed and went out and took the captain with him, and slammed the door, and so I remember it, and nothing was said about anything else.

Q. He said nothing about the "Commerce"?

A. No.

Q. Although at that time you had been advised

(Testimony of C. A. Blumer.)

by the senior Kirchmann that he would like to know where this cargo was?

A. And I had already told him.

Q. And you had already told him? A. Yes.

Q. And you were not interested further at that time?

A. Well, you see, the "Commerce" was only one boat, and I had lots of other business to attend to. I would not be thinking of the "Commerce" all the time.

Q. You are a very busy man?

A. Well, at times.

Q. Did you cancel any other contracts?

Mr. SUTRO.—I object to that as absolutely immaterial.

The COURT.—Sustained.

Mr. McCLANAHAN.—I think that is all.

Redirect Examination.

Mr. SUTRO.—Q. Mr. Blumer, the demurrage notices are given from day to day, aren't they, when demurrage is called for?

A. When demurrage becomes due— [135]

Mr. McCLANAHAN.—Hold on: I object to that as immaterial and irrelevant.

The COURT.—Sustained.

Mr. SUTRO.—I note an exception to the ruling.

Q. The letter which you referred to on your cross-examination, and which you said was the letter you received from Mr. Slingerland, dated on or about October 7th, is this the letter to which you referred?

(Testimony of C. A. Blumer.)

A. Yes.

Mr. SUTRO.—I offer this letter in evidence.

Mr. McCLANAHAN.—Objected to as immaterial, irrelevant and incompetent.

The COURT.—Sustained.

Mr. SUTRO.—If your Honor please, that was brought out on their cross-examination.

Mr. McCLANAHAN.—It was simply for the purpose of refreshing his memory as to a date.

Mr. SUTRO.—Exception. That is all.

Testimony of John B. Blair, for Respondent.

JOHN B. BLAIR, called for the respondent, sworn.

Mr. SUTRO.—Q. Mr. Blair, what is your business? A. Shipping and commission.

Q. How long have you been in the shipping business? A. About 20 years.

Q. Here in San Francisco?

A. In San Francisco.

Q. Are you familiar with a clause in charter-parties giving the charterer the right to cancel a charter? A. Yes.

Q Is that right a valuable right?

Mr. McCLANAHAN.—That is objected to as immaterial.

The COURT.—Sustained; anybody would know that. [136]

Mr. McCLANAHAN.—I will admit that it is valuable.

(Testimony of John B. Blair.)

Mr. SUTRO.—Very well, we will take that admission.

Q. Are you familiar with the matter of giving notices for demurrage in this port, when notices are given?

Mr. McCLANAHAN.—I object to that as immaterial.

The COURT.—He can answer the question; I don't see that it is immaterial.

Mr. SUTRO.—I will explain it to your Honor. We claim—

The COURT.—I don't see why it is material as a collateral matter. I permitted the other answers from the other witness under cross-examination because he is one of the parties, and as bearing on the credibility of his testimony. It is a collateral matter. I don't see that it is material.

Mr. SUTRO.—Very well. That is all, Mr. Blair.

Mr. McCLANAHAN.—No cross-examination, Mr. Blair.

Testimony of R. N. Slingerland, for Respondent.

R. N. SLINGERLAND, called for the respondent, sworn.

Mr. SUTRO.—Q. What is your business, Mr. Slingerland?

A. I am manager of the order and distributing department of the Standard Oil Company.

Q. Did you have any negotiations with Sanders & Kirchmann, or with Mr. Wolff, representing

(Testimony of R. N. Slingerland.)

Sanders & Kirchmann, for the chartering of a number of schooners in 1918? A. Yes.

Q. About when was that?

A. In the latter part of the year.

Q. Those negotiations were consummated by a letter that was written to you and which has been offered in evidence here and marked Libelant's Exhibit No. 15: Is that a fact? A. Yes.

Q. And that letter is dated November 19, 1918?

A. Yes, sir.

Q. And the ten charters concerning which testimony has been [137] given here are all contained in this letter?

A. I would not say that the ten charters were in that letter, Mr. Sutro; I think they only involve five ships for one trip; the rest of the charters were consummated in other letters.

Q. But the ten voyages were by those five ships?

A. Yes.

Q. There has been offered in evidence here a letter dated September 4, 1919, from yourself to Sanders & Kirchmann, referring them to Mr. Bluner for all matters in connection with charters of the Vacuum Oil Company: Do you recall such a letter? A. Yes.

Q. Is that a copy of the letter—it is marked Respondent's Exhibit "A."

A. Yes, that is a copy.

Q. From that time on did you have any dealings with Sanders & Kirchmann, or Wolff, Kirchmann,

(Testimony of R. N. Slingerland.)

& Co., concerning the schooner "Commerce," until some time along in October? A. No.

Q. I want to show you a letter and ask you if you recognize it. A. Yes.

Mr. McCLANAHAN.—I don't see the materiality of this letter, your Honor.

Mr. SUTRO.—This is a letter dated October 10, 1919, signed S. G. Casad, with the initials "R. N. S.," and addressed to Mr. Henry Kirchmann, Jr.

Q. Did you write that letter?

A. I dictated it; yes.

Mr. SUTRO.—This letter reads as follows:

Respondent's Exhibit "I."

(Letter-head of Standard Oil Company.)

"San Francisco, Cal., October 10, 1919.

In replying please refer to File "S."

ORIGINAL.

Mr. Henry Kirchmann, Jr.,
212 American Nat'l Bank Bldg.,
San Francisco, California.

Dear Sir: [138]

Schooner 'COMMERCE.'

In your absence I spoke to Mr. Wolff some time ago regarding the probable necessity of having to shift this vessel from the berth she is now occupying at our Point Orient Wharf to another berth where she will not interfere with operations.

We now need the birth which this vessel is occupying, for other purposes, and we understand you authorize us to shift her. Since there is no crew

(Testimony of R. N. Slingerland.)

aboard, and as we understand that you desire to save the expense of supplying men and tugs from San Francisco, we are willing to undertake, without any responsibility, the work of shifting the vessel—you to pay us our out-of-pocket expenses and absolve us from all liability in case of mishap caused to or by the vessel. We guarantee that the cost of shifting the vessel will not exceed $50.00, and if you shall hereafter, within a reasonable time, desire to have her shifted back, we will do so upon the same terms for the same price.

Kindly signify your acceptance of the foregoing by signing duplicate of this letter and return to bearer.

Yours very truly,

S. G. CASAD, R. N. S.

RNS:T.

Accepted:

WOLFF, KIRCHMANN & CO., Inc.,

A. E. WOLFF,

President."

(The letter was marked Respondent's Exhibit "I.")

Q. Was the "Commerce" moved in pursuance of that letter? A. Yes.

Q. And was the bill rendered the owners of the "Commerce" for the moving?

A. There was a bill rendered, yes.

Mr. McCLANAHAN.—We will admit that there was.

Mr. SUTRO.—The bill is dated October 11th.

(Testimony of R. N. Slingerland.)

Q. I will show you a bill and ask you if you recognize it as a copy of the bill? A. Yes.

Mr. McCLANAHAN.—What is the materiality of this?

Mr. SUTRO.—The materiality of it is, Mr. McClanahan, now [139] that you have asked me, to show that this vessel, on October 10th, lying at the wharf, there, doing nothing, was in the way, and we told the owners she was in the way, and asked if she could be moved, and if they would pay the expense, and they said yes, that she never at any time while laying there asked for any cargo, and was never ready to receive any cargo, that there was a stevedores' strike on, and she never did load.

Mr. McCLANAHAN.—You say that it shows all that?

Mr. SUTRO.—No, it doesn't show all that, but you asked me the materiality of it, and that is it.

The COURT.—Proceed.

Mr. SUTRO.—This reads as follows:

Respondent's Exhibit "J."

(Billhead of Standard Oil Company.)

COPY.

San Francisco, Cal., Oct. 11th, 1919.

Wolff, Kirchmann & Co.,
495 California St.,
San Francisco, Calif.

To services of our tug 'Standard No. 1' shifting your schooner 'Commerce' from Berth #3 to Berth #2 at Pt. Orient.....$50.00"

(The document was marked Exhibit "J.")

(Testimony of R. N. Slingerland.)

Q. And that bill was paid? A. Yes.

Q. On September 4th, you had written to Sanders & Kirchmann to get all the information concerning the "Commerce" and these other boats from Mr. Blumer.

Mr. McCLANAHAN.—I object to that as leading.

Mr. SUTRO.—Well, the letter speaks for itself.

The COURT.—Proceed.

Mr. SUTRO.—Q. Why did you write to Kirchmann instead of Mr. Blumer about the "Commerce"?

A. Do you want to know why I took it up with Kirchmann?

Q. With Henry Kirchmann, Jr., instead of Mr. Blumer.

A. I had previously taken it up with Mr. Blumer, and— [140]

Q. You say you had previously taken it up?

A. Yes.

Q. How did you take it up with him?

A. I wrote him a letter.

Q. Look at this letter and see if you recognize it.

A. Yes.

Mr. McCLANAHAN.—Is that the same old letter?

Mr. SUTRO.—Yes.

Mr. McCLANAHAN.—I object to it as hearsay, as immaterial, irrelevant and incompetent, as not binding on the libelant in this case.

(Testimony of R. N. Slingerland.)

The COURT.—Sustained; it is not binding on the parties.

Mr. SUTRO.—Counsel has a very violent objection to this letter. It is a very significant letter. We note an exception.

Mr. McCLANAHAN.—Now, I am perfectly willing to have the Court read the letter.

Mr. SUTRO.—Very well.

Mr. McCLANAHAN.—Sure, let the Court read it; I am perfectly willing.

The COURT.—I don't care anything about it; I am satisfied that it is immaterial.

Mr. McCLANAHAN.—All right, your Honor, but I was charged with being afraid of it.

Mr. SUTRO.—Oh, no, not that you were afraid of it. I said it was a very significant letter. I don't think you are afraid of anything.

The COURT.—Proceed.

Mr. SUTRO.—Q. Mr. Slingerland, do you know whether, up to October 10th, or, say, from September 16th on to October 11, 1919, there was a stevedores' strike on in this harbor? A. Yes.

Q. What about the rates in the charter-party, this charter for which the cancellation notice was given, were they high or low?

A. They were the highest rates we ever paid for a ship of that [141] kind.

Q. And as to the character of the cargo, taking on-deck and under-deck cargo, had that ever been done before?

A. Oh, no; that was new to us, absolutely.

(Testimony of R. N. Slingerland.)

Q. At the time that the cancellation notice was given, had the rates fallen?

A. Why, yes, the rates went down very rapidly.

Q. Did anybody, on behalf of the "Commerce," from the time that she went up to Point Orient on September 16, 1919, ever ask you for any cargo for her?

A. None whatever; no, there was no demand made for cargo.

Q. Was any notice for any demurrage ever served on you for the "Commerce" at any time?

A. None whatever.

Q. Did you ever ask Mr. Kirchmann when the "Commerce" was on the dry-dock how she was getting along? A. No, sir.

Q. When the freight was paid on the second charter, that was paid for the account of the Vacuum Oil Company, was it?

Mr. McCLANAHAN.—Please don't lead the witness.

Mr. SUTRO.—Q. Well, for whose account was it paid? A. Paid for account of the charterers.

Q. The charterers being whom?

A. The Vacuum Oil Company, Pty., Ltd.

Q. Did you ever speak to Mr. Wolff about the "Commerce" when she was on the dry-dock, and ask him when she would be ready to go up?

A. No, sir.

Q. After you had sent that letter of September 4th, will you state whether or not the business had been turned over by you to Mr. Blumer?

(Testimony of R. N. Slingerland.)

A. I don't understand you.

Q. After you wrote to them the letter of September 4, advising them that Mr. Blumer was to be looked to regarding all business for the Vacuum Oil Company, Pty., Ltd., did you have anything more to do with that business?

A. No, sir; I was through, [142] absolutely, with all the Vacuum Oil Company's affairs.

Q. Until the letter of October 11th? A. Yes.

Cross-examination.

Mr. McCLANAHAN.—Q. You were through with the Vacuum Oil Company's affairs, you say, until the letter of October 11th?

A. Until the letter of what?

Q. Until the letter of October 11th.

Mr. SUTRO.—October 10th.

Mr. McCLANAHAN.—Q. That is your answer, is it?

A. I am still through with them; I have nothing to do with them, whatsoever.

Q. The letter of September 4th finished your connection with the Vacuum Oil Company ?

A. No, sir; that didn't finish my connection with them. I was through with the handling of the Vacuum Oil Company's affairs as soon as Mr. Blumer appeared on the scene to take over the affairs of his company.

Q. Why did you pay the freight on the second charter?

A. That was one of the conditions of the sale to

(Testimony of R. N. Slingerland.)

the Vacuum Oil Company. That frequently happens; we advance money for different people.

Q. In paying that freight, you deducted a commission, didn't you?

A. According to the terms of the charter-party.

Q. Who received that commission?

A. Let me see—I am not clear. I think there were two commissions under that charter-party.

Q. Yes, one on the lumber, and one on the case oil.

A. But there were two commissions paid by different principals.

Q. One was paid here and one down below?

A. There was an address commission, if I am not mistaken, and there was a commission payable to the ship broker, here, so called.

Q. Didn't you receive a commission, the Standard Oil Company? A. Not a cent; no, sir.

Q. Who did receive it?

A. Nobody received it, in fact, no. [143]

Q. Wasn't it deducted from the freight payment?

A. The charter-party was so worded that all deductions for commission resulted in a net freight. I remember that very clearly, because I negotiated the charter myself.

Q. Wasn't that deducted—the 2½% commission?

A. I am pretty sure the address commission was deducted, and the commission to the ship broker, both of them.

Q. Both deducted? A. Yes.

Q. You say this was one of the highest charters made on this coast?

(Testimony of R. N. Slingerland.)

A. I didn't say that; no, sir.

Q. What did you say?

A. I said it was the highest price charter we ever paid.

Q. You paid the going market price, though?

A. Do you mean for the case oil, or for the whole ship?

Q. For the "Commerce."

A. Do you mean for the ship, or for the character of the goods: What do you mean?

Q. Well, what do you mean when you say it is the highest you ever paid?

A. I don't know how to answer your question; do you mean for the ship, or for the character of the goods?

Q. I am talking about the freight, which I supposed you were talking about when you said it was the highest that was ever paid. Was that the market freight at that time?

A. You mean for the case oil?

Q. Yes. A. Yes.

Q. And for the lumber?

A. I am not prepared to say on that, because lumber is not our business. I had to pay that lumber freight to get the ship.

Q. You are not prepared to answer my question?

A. No, sir. I was told that that was the going rate. I am not in the timber business, I don't know anything about it, but I had to pay the [144] lumber freight to get the ship.

Q. Mr. Slingerland, prior to this trouble, is it not

(Testimony of R. N. Slingerland.)

a fact that vessels, under the charters that you made for the Vacuum Oil Company, went to your loading ports and were there loaded with the cargo called for by the respective charter-parties, and performed their contracts without any trouble?

Mr. SUTRO.—I object to the question as immaterial and irrelevant; it does not bear on any issue in this case.

The COURT.—Let it go in the record.

Mr. SUTRO.—Exception. A. Yes.

Mr. McCLANAHAN.—Q. Do you know why you sent the letter of September 4th, cutting loose from the Vacuum Oil Company, Pty., Ltd.?

A. Only to put right in the minds of the Messrs. Kirchmann and Mr. Wolff, and all of them in connection with his association that I was no longer interested in the Vacuum Oil Company, Pty., Ltd. affairs in relation to their unfinished business on charter-parties that were yet to be completed.

Q. Did you know at that time that Mr. Blumer intended, if he could, to cancel the charter-party?

A. No.

Q. That was not one of the reasons why you decided to have nothing more to do with that charter?

A. Oh, no. I was through, as I testified before, when Mr. Blumer came here to take over the duties of the Vacuum Oil Company, Pty., Ltd.

Q. Do you know when the "Commerce" went to the Point Orient dock?

A. Only from what I heard here, about September 16th, yes.

(Testimony of R. N. Slingerland.)

Q. If you had been asked to designate the loading berth for the "Commerce," would you have designated it?

Mr. SUTRO.—I object to that question as a hypothetical question not predicated on any facts in the case.

The COURT.—Sustained. [145]

Mr. McCLANAHAN.—Q. Did you designate any loading berth for the "Commerce"? A. No.

Q. Did your office? A. No.

Q. Who would have authority, in your office, to do it?

A. There would be nobody in my office who would have authority to do it.

Q. Was not the Point Orient dock the proper berth for loading that vessel?

A. It was one of the regular places of delivery, yes.

Q. Under that charter-party? A. Yes.

Q. Do you know whether you had your cargo ready to load on her?

A. It was ready; we were all prepared to deliver that cargo to the "Commerce."

Q. Why didn't they deliver?

A. The ship never called for it; she just lay up there doing nothing.

Q. She was there?

A. I know, but how are you going to put cargo aboard when the ship is not there ready to fulfill its charter-party; it had no means of getting the stuff aboard. We only had to move it to ship's tackles.

(Testimony of R. N. Slingerland.)

Q. Wasn't she there on September 16th?

A. Yes.

Q. And you knew she was there? A. Yes.

Q. And you knew she had this wonderful charter-party? A. Well, what of it?

Q. What should she have done?

A. If she was ready, she would have called for the cargo, wouldn't she?

Q. Is that the way that all the vessels do, politely ask for cargo?

A. No vessels ever come up there under the same circumstances as the "Commerce" did; they all come up there ready to load.

Q. Why wasn't she ready to load?

A. I don't know.

Q. As a matter of fact, Mr. Slingerland, wasn't she ready to load? A. I don't know that. [146]

Q. All you know is she didn't demand the cargo?

A. Absolutely, and I will say—

Q. And you don't know whether she was ready to load, or not? A. No.

Mr. SUTRO.—Q. What were you going to say?

A. I say we were all ready to deliver her the cargo.

Mr. McCLANAHAN.—Q. And if she simply said: "Gentlemen, I demand cargo," she would have got it?

A. Because I had orders to give it to her.

Q. And you were simply waiting for her to demand it: Is that it? A. Certainly.

Q. If you had orders to give it to her, and she

(Testimony of R. N. Slingerland.)

had demanded it, your orders would have been carried out by delivering the cargo at the ship's tackles? A. Yes, sir.

Q. Did your orders to deliver the cargo specify the brands to be delivered? A. Yes.

Q. And those brands the ship owner didn't know anything about, did he? A. Oh, no.

Q. Was not the "Jewett" loading at the time the "Commerce" went up there?

A. Yes; there were several vessels we loaded during the strike, but I don't know just which ones they were.

Q. The "Commerce" could have been loaded during the strike; there was no trouble about that, was there?

A. I am not saying whether she could, or not, I don't know.

Q. The "Jewett" had stevedores? A. Yes.

Q. Don't you know that you begged Mr. Wolff not to send non-union stevedores up to the "Commerce," because you had union stevedores loading the "Jewett"?

A. No, that is not so, that is not so.

Q. That would have been an unfortunate thing to do, wouldn't it?

Mr. SUTRO.—I object to the question as incompetent, whether it would have been an unfortunate thing to do, or not.

A. Well, that is not so. [147]

Mr. McCLANAHAN.—I withdraw the question.

Q. Mr. Slingerland, as you understand it, then,

(Testimony of R. N. Slingerland.)

the only thing that stood in the way of carrying out the contract was the failure to demand the cargo?

A. That is the only thing under the sun that I know of, Mr. McClanahan.

Q. By "demand," I mean make a verbal or written demand? A. No, I would not say that.

Q. What kind of a demand do you mean?

A. I would not pay any heed to a demand for cargo if a ship was not in a position to take it on board; I would not say that it was a *bona fide* demand for cargo.

Q. You didn't know she was not in a position to take on cargo, did you?

A. Yes, I did know it, because I received complaints from our people up at the refinery that the "Commerce" was occupying a berth there, and we were constantly putting goods on lighters for other ships that came up there for loading.

Q. That was in October?

A. That was after she got up there and lay there a couple of weeks. I think the complaints came in after she was there an undue length of time.

Q. But I mean when she went there first she was ready to receive cargo?

A. You mean as far as the ship was concerned?

Q. Yes. A. Yes, I suppose so.

Q. Her holds were cleaned out and ready?

A. I suppose so.

Q. And her hatches were off?

A. But I don't know whether she was ready to work.

(Testimony of R. N. Slingerland.)

Q. What do you mean by being ready to work?

A. To take on cargo.

Q. How do you mean?

A. How are you going to take cargo when there is no means to put it aboard?

Q. Do you refer to stevedores?

A. Stevedores or any other means.

Q. Didn't she have the same means when she loaded under the second charter-party as she had when she was at the dock on September [148] 16th? A. No, that time she had stevedores.

Q. Then the only thing she lacked was stevedores; is that the only thing that differed in her condition between the second charter and on September 16th, the absence of stevedores?

A. The absence of being able to load the cargo. I presume that was principally because of the stevedores.

Q. You can think of nothing else that she lacked?

A. I can think of nothing else. She was not ready to work.

Q. Because she had no stevedores? A. Yes.

Q. But otherwise she was in a position to work?

A. If she was in a position to work, we would have delivered the cargo.

Q. Do you remember some time around September 18th or 20th, 1919, having a telephone conversation with Mr. Wolff with reference to the "Commerce," in which it was mutually understood over the telephone that it would be inadvisable to employ union men in loading the "Commerce"—no, I

(Testimony of R. N. Slingerland.)

mean non-union men in loading the "Commerce," because the "Jewett" was loading with union men, and that you said to Mr. Wolff, "For God's sake, Wolff, don't send non-union men up here until the 'Jewett' is through. Stevenson is working her with union men, and there would be trouble if at the same time you had non-union men on the "Commerce' at the same berth"?

A. I was handling the situation with all ships along those lines at that time; in other words, when a union gang got away, we would take on a ship that wanted to work with a non-union gang. The reason should be very apparent to you, that we didn't want to cause a fracas or a mix-up on our property between non-union and union men. If Mr. Wolff says that he took that up with me, it probably might have happened, because it was a daily occurrence with everybody. That is the only significance to that.

Q. If Mr. Wolff says that that is true, you would not contradict it?

A. I would not contradict it. I was doing it with everybody. [149] I remember the incident constantly coming up.

Testimony of C. A. Blumer, for Respondent (Recalled).

C. A. BLUMER, recalled for respondent.

Mr. SUTRO.—Q. There has been offered in evidence a surveyor's report. Was this letter received by you with that report? A. Yes.

(Testimony of C. A. Blumer.)

Mr. SUTRO.—I offer it in evidence. It is from Sanders & Kirchmann, dated September 16, 1919, and reads as follows:

Respondent's Exhibit "K."

(Letter-head of Sanders & Kirchmann, Inc.)

"San Francisco, Cal., Sept. 16th, 1919.

Mr. C. A. Blumer,
Mills Building,
San Francisco.

Dear Sir:

Enclosed herewith you will find surveyor's report on the Schr. 'Commerce.'

Yours very truly,
SANDERS & KIRCHMANN, INC.
By H. KIRCHMANN,
Secretary."

(In rubber stamp: "Sep. 18, 1919.")

(The document was marked Respondent's Exhibit "K.")

Q. Mr. Blumer, did Mr. Kirchmann, Sr., ever say anything to you about using union or non-union labor on any of their vessels?

A. I asked him why he was not completing the "Luzon," because she had loaded for us and was lying at the timber wharf and not working, and—

Q. When was that?

A. I think she finished loading the case oil about the 11th or 12th of September, 1919, and she went over to the timber wharf and did not start to work.

Q. And what did he say?

(Testimony of C. A. Blumer.)

A. He said he did not wish to use non-union labor.

Q. What else did he say?

A. He just left the vessel lying there. [150]

Q. What else did he say about the labor: Did he tell you why he didn't want to?

A. He said if he used any non-union labor here he probably might have trouble with labor in New Zealand, which was all union labor.

Mr. SUTRO.—That is all.

Mr. McCLANAHAN.—No questions.

Mr. SUTRO.—That is our case. As a part of the respondent's case, your Honor, it was alleged that the Vacuum Oil Company was a corporation under the laws of the United States. That is a mistake. It is an Australian corporation. I have stipulated to that effect with counsel as follows:

Respondent's Exhibit "L."

"It is hereby stipulated by and between the respective parties to the above-entitled action, as a fact to be used as evidence upon the trial of said action, that Vacuum Oil Co. Pty., Ltd., respondent in the above-entitled action, is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Australia."

I will present that stipulation as an exhibit.

(The document was here marked Respondent's Exhibit "L.")

The COURT.—Very well.

Mr. SUTRO.—That is our case.

Testimony of A. E. Wolff, for Libelant (Recalled in Rebuttal).

A. E. WOLFF, recalled for libelant in rebuttal.

Mr. McCLANAHAN.—Q. Mr. Wolff, are you familiar with the stevedoring situation in September, 1919, at the time that the "Commerce" went to the Point Orient Dock for loading?

A. Yes, sir.

Q. Would it have been possible to have secured stevedores to have loaded the "Commerce" at that time? A. Yes.

Q. Do you remember having a conversation over the telephone [151] about that time with Mr. Slingerland, with reference to stevedoring the "Commerce"? A. I do.

Q. State to the Court the substance of that conversation as you remember it.

A. In essence, I told Mr. Slingerland that Sanders & Kirchmann, the owners, naturally wanted to work the ship with non-union men if they could. This was just shortly after the ship went up there. The "Jewett" was working then with non-union men. Slingerland, over the telephone, said—he was quite excited—in essence, "For God's sake, Wolff, don't send non-union men up there while the 'Jewett' is there. Stevenson is working her with union men, and we don't want to have friction on our property." I asked Mr. Slingerland—I am not sure whether it was in the same conversation or not, whether he had any preference, whether they wanted to force us with union men, and he said no,

(Testimony of A. E. Wolff.)

that it was perfectly in order to wait.

Q. Was the "Jewett" being loaded with union or non-union men?

A. The "Jewett" was being loaded with union men.

Q. With union men? A. With union, men, yes.

Q. And you could have secured non-union men?

A. We could have secured non-union men.

Cross-examination.

Mr. SUTRO.—Q. The "Philippine" was here in the harbor at that time, was she not?

A. I think she was, but I was not handling her.

Q. But she was one of the Sanders & Kirchmann vessels, wasn't she?

A. Yes, but I was not handling them all.

Q. I didn't ask you whether or not you were handling them, or handling them all. If she was lying in the harbor, why didn't you discharge her with non-union labor?

Mr. McCLANAHAN.—The witness has testified he was not handling her; I object to the question as immaterial, irrelevant [152] and incompetent, and not proper cross-examination.

The COURT.—Sustained.

Mr. SUTRO.—Q. The "Samar" was one of the vessels of Sanders & Kirchmann: She was in the harbor, wasn't she?

A. Yes, with a cargo for Wolff, Kirchmann & Co.

Q. She was lying idle, too, wasn't she

A. No. I heard Mr. Slingerland's testimony on that point, and my memory—I will have to check it

(Testimony of A. E. Wolff.)

up from the office records, but my memory is that we discharged her at great expense with non-union men, having to pay for guards to protect them; that is my memory, but I want to check it up as to whether it was the "Samar," or one of the other ships.

Q. You don't know that?

A. I don't know positively, but I believe it was the "Samar."

Q. The "Luzon" was lying at the timber wharf, wasn't she? A. That I don't know.

Q. She was one of Sanders & Kirchmann's vessels?

A. Yes, but I had no interest in her cargo.

Q. Had you not negotiated her charter?

A. Yes, but no question came up that called for my intervention. She had progressed far enough with loading so that there was no question at all from my side of the house.

Q. She did not take on the lumber cargo?

A. That I don't know.

Q. You don't know whether she did, or not?

A. No, I don't know that.

Q. You don't know that the completion of her loading with non-union labor could have been performed?

A. I don't know that it was not performed.

Q. This conversation that you had with Mr. Slingerland was when?

A. As nearly as I can place it, it was within two or three days after the "Commerce" went up.

(Testimony of A. E. Wolff.)

Q. About September 18th? A. To 20th. [153]

Q. In other words, it was about two weeks after Mr. Slingerland had advised you to communicate with Mr. Blumer about all these matters?

A. He had not advised me, he had advised Sanders & Kirchmann.

Q. You draw a distinction, then, so far as the non-union and union labor business is concerned, between notices received by you and notices received by Sanders & Kirchmann?

Mr. McCLANAHAN.—I object to that as argumentative.

The COURT.—The witness has stated what he understands the fact to be.

Mr. SUTRO.—Very well, your Honor, that is all.

Testimony of Henry Kirchmann, Jr., for Libelant (Recalled in Rebuttal).

HENRY KIRCHMANN, Jr., called for libelant in rebuttal.

Mr. McCLANAHAN.—Q. Were you familiar with the stevedore situation when the "Commerce" went to Port Orient A. I was.

Q. Were stevedores available to have loaded the "Commerce" at that time?

A. Stevedores were available.

Cross-examination.

Mr. SUTRO.—Q. You mean non-union stevedores?

A. Both union and non-union were available.

Q. Stevedores, both union and non-union being

(Testimony of Henry Kirchmann, Jr.)

available, and the "Commerce" being there from September 16th on, Sanders & Kirchmann, Inc. never made any demand on the Standard Oil Company, or on Mr. Blumer, for any cargo for the "Commerce"?

A. We did make demand for cargo.

Q. You tendered her, you say?

A. We tendered the boat, and made a demand.

Q. But after that you never made any demand for cargo?

A. Our captain was asking for cargo daily.

Q. You didn't hear him ask up there, did you?

A. No, but that [154] was his business, and he was instructed to ask, and he telephoned us that he asked for it.

Q. He telephoned to you? A. Yes.

Q. Who did he ask?

A. I don't understand you.

Q. You say he telephoned to you that he was asking daily? A. For cargo; yes.

Q. Did he telephone to you daily?

A. He didn't telephone us daily, but in his conversation when he did telephone he said he had been asking for cargo daily.

Q. And do you mean to say your captain told you he was asking for cargo daily, and he got none, and you never communicated with Mr. Slingerland, or Mr. Blumer?

A. Yes, we did, we asked for cargo, from the Standard Oil Company; when we were talking with them we asked for cargo.

(Testimony of Henry Kirchmann, Jr.)

Q. I asked you before, when you testified on your cross-examination, if you had ever asked anybody, after she got up there, for any cargo, or sent in any demurrage bill, and you said no.

A. We sent no demurrage bill, but we had asked for cargo.

Q. Who did you ask?

A. The Standard Oil Company.

Q. Who?

A. I don't know who in the Standard Oil Company.

Q. Did you do the asking?

A. We telephoned; yes.

Q. I say, did you do it? A. Yes.

Q. To whom did you telephone?

A. The Standard Oil Company.

Q. Don't you know to whom you telephoned?

A. I don't know if it was Mr. Peas, or Mr. Moore, or Mr. Slingerland, or who it was.

Q. And you never followed it up by a written complaint?

A. We were waiting for the Standard Oil Company's next move, to offer us cargo, and then we would go and get stevedores.

Q. Did your captain tell you who he was asking up there? A. Yes.

Q. Who did he say he was asking?

A. Jones and Connolly. [155]

Q. Jones and Connolly? A. Yes.

Q. They have gone. You know that the ship was

(Testimony of Henry Kirchmann, Jr.)

shifted and that a bill of $50 was paid for that shifting, don't you?

A. I believe that was after the letter of cancellation reached us.

Q. It was after the letter of cancellation reached you?

A. I think it was either on that day or the day after.

Q. You are mistaken. It was on the 10th, and the bill was paid on the 11th. The letter is dated the 10th, and it was accepted and returned by bearer. I will show you the letter. It is dated October 10th. Why did you agree to the shifting of this vessel, and to pay $50 to have it done if she was lying there to get a cargo, and make no written complaint, or any complaint?

A. October 10th is one of the dates when I do not believe I was in town; that was during my absence, as that letter bears out.

Mr. SUTRO.—That is all.

Mr. McCLANAHAN.—That is our case.

(By consent of counsel, the cause was thereupon submitted upon briefs to be filed in 5, 5 and 3.)

[Endorsed]: Filed Jun. 13, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [156]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,701.

SAN MATEO REALTY & SECURITY COMPANY et al.,

Libelants,

vs.

VACUUM OIL CO., P'T'Y, LTD.,

Respondent.

(Deposition of Charles Anderson, Taken on Behalf of Libelants.)

BE IT REMEMBERED, that on Tuesday, September 7, 1920, pursuant to stipulation of counsel hereunto annexed, at the offices of William Denman, Esq., in the Merchants Exchange Building, in the City and County of San Francisco, State of California, personally appeared before me, Francis Krull, a United States Commissioner for the Northern District of California, authorized to take acknowledgments of bail and affidavits, etc., Charles Anderson, a witness called on behalf of the libelants.

William Denman, Esq., appeared as proctor for the libelants, and Alfred Sutro, Esq., appeared as proctor for the respondent, and the said witness having been by me first duly cautioned and sworn to testify the truth the whole truth and nothing but the truth

in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(It is hereby stipulated and agreed by and between the proctors for the respective parties that the deposition of the above named witness may be taken *de bene esse* on behalf of the libelants, at the offices of William Denman, Esq., in the Merchants Exchange Building, in the City and County of San [157] Francisco, State of California, on Tuesday, September 7, 1920, before Francis Krull, a United States Commissioner, for the Northern District of California, and in shorthand by Charles R. Gagan.

(It is further stipulated that the deposition, when written up, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said depositions, and that all objections as to materiality and competency of the testimony are reserved to all parties.

(It is further stipulated that the reading over of the testimony to the witness and the signing thereof are hereby expressly waived.) [158]

CHARLES ANDERSON, called for the libelants, sworn.

Mr. DENMAN.—Q. Captain, how long have you been at sea? A. About 42 years.

Q. In and out of this port?

A. About 37 years in and out of San Francisco.

Q. What character of ships? A. All classes.

(Deposition of Charles Anderson.)

Q. Do you remember the schooner "Commerce"?

A. The schooner "Commerce"; yes, sir.

Q. Were you master of her in the fall of 1919?

A. Yes, sir; I took charge of her in September.

Q. Where did you take charge of her?

A. In San Francisco, or, rather, in Alameda.

Q. Do you remember a voyage on the "Commerce" finishing in San Francisco Bay in the month of September, 1919? A. Yes, sir.

Q. Do you remember discharging your prior cargo? Yes, sir, I do.

Q. What did you do after you had discharged the cargo, with reference to the ship herself?

A. We went over to the Alameda Shipyards, the Bethlehem Shipyards, to repair the ship.

Q. After the ship was finished, where did you go?

A. We went to Point Orient.

Q. What was the condition of your holds on arrival up there?

A. The condition of the holds was that they were swept clean and dunnage laid for a new cargo

Q. Were the holds in condition to take on a new cargo at that time? A. Yes, sir.

Q. When did you arrive in Point Orient?

A. We arrived on the 16th of September, at 11:15 A. M.

Q. Where did you go when you arrived at Point Orient?

A. You mean where did I go, personally? [159]

Q. No, where did the ship go.

(Deposition of Charles Anderson.)

A. She stayed right there.

Q. Whereabouts in the port did you go to?

A. We went to Denedin, New Zealand.

Q. Whereabouts at Point Orient did you go?

A. We went right alongside the wharf.

Q. What wharf did you go alongside?

A. The inside wharf, alongside the shed.

Q. What wharf is that?

A. I don't know the number of it; it is the inside wharf, anyway.

Q What is the name of the wharf?

A. Point Orient wharf.

Q. What is Point Orient?

A. It is a landing, where they load case oil.

Q. For whom?

A. For the Standard Oil Company.

Q. When you arrived there, did you receive any directions where to go with your ship?

A. They told me where to tie the ship up.

Q. Who told you that?

A. A gentleman by the name of Connolly.

Q. What was his business there?

A. He was what they call the labor boss.

Q. For the Standard Oil Company? A. Yes, sir.

Q. Where did he direct you to go?

A. He was right there on the wharf and took the lines, and he told me to make the ship fast right there. He took some of the lines himself.

Q. You made it fast, did you?

A. Yes, I made the ship fast right to that wharf.

(Deposition of Charles Anderson.)

Q. Do you know why you made it fast at that point? A. Yes, sir.

Q. Why? A. We came there to load case oil.

Q. Was there any case oil near your vessel?

A. There was case oil in the shed on the wharf.

Q. How near to your vessel was that?

A. About 25 or 30 feet.

Q. That was alongside? A. Yes. [160]

Q. Do you know what the case oil was intended for?

A. I was told that some of it was intended for the "Commerce."

Q. Who told you that? A. Mr. Connolly.

Q. You mean at the time you went there?

A. Yes, sir.

Q. What did you say to Mr. Connolly about your ship?

A. I told him that she was ready for loading.

Q. What did he do then?

A. I don't know that he did anything; he didn't do anything.

Q. Did he examine your ship?

A. Oh, yes, he went down in the hold and examined the ship, examined the dunnage.

Q. He examined the dunnage, did he?

A. Yes, sir.

Q. And what did he say about the dunnage?

A. He said it was perfectly satisfactory.

Q. Was that before or after he pointed out the cargo to you?

(Deposition of Charles Anderson.)

Mr. SUTRO.—That is objected to on the ground that it assumes a fact that has been proven.

A. Well, that is more than I can say, whether it was before or after.

Mr. DENMAN.—Q. Was it at the same time?

A. About at the same time.

Q. What does the labor boss do on that dock?

A. He is running the gang that is wheeling out the cases to the ship's side.

Q. Does he bring out cargo to the ship's tackle?

A. Yes, sir.

Q. Have you ever seen him do it in any other case? A. Oh, yes.

Q. Many times there?

A. I saw it two particular times being done.

Q. For other vessels? A. Yes, sir.

Q. Loading there? A. Loading right there.

Q. Who else did you talk with at Point Orient, if anybody, regarding your vessel? A. Mr. Jones.

Q. Who is Mr. Jones?

A. He is the head man for the two [161] wharves.

Q. Who does he represent there?

A. The Standard Oil.

Q. What was the conversation between you and Mr. Jones?

A. About the same it was with Mr. Connolly, that the ship was ready for loading.

Q. Did he go aboard your ship? A. Yes, sir.

Q. Did he examine her?

A. He went down in the hold and examined the dunnage, and everything.

(Deposition of Charles Anderson.)

Q. How soon was that after you arrived?

A. Well, it probably was four or five days, or so; I could not state the date exactly.

Q. Within a week, anyway, of the time of your arrival. A. Yes, sir.

Q. What did he say about the dunnage?

A. He said it was perfectly satisfactory; the fact of the matter is he said it was the best dunnage he ever saw laid in this country

Q. Where had you sailed from before you came there? A. We came from Levuka, Fiji, Islands.

Q. Have you the date you left there?

A. I don't remember the date of that.

Q. Can you remember the week you left Levuka?

A. No, I cannot remember that; it was in the month of June, I believe.

Q. In the month of June? A. Yes, sir.

Q. The latter part, or the former part?

A. About the middle, I think.

Q. About the middle of June?

A. Yes. We arrived here in August. We were 72 days coming home; I remember that.

Q. 72 days coming home from Levuka? A. Yes.

Q. On what date in August did you arrive?

A. That is something I cannot remember, either.

Q. Do you remember how many days you were discharging your cargo [162] here?

A. Five days.

Q. And how soon after that did you arrive at Point Orient?

(Deposition of Charles Anderson.)

A. I don't know exactly; it might have been two weeks, perhaps, as near as I can remember now.

Q. Before you arrived at Point Orient, did you know that the cargo was ready for you?

A. No, sir.

Q. When did you first learn that the cargo was ready for you?

A. After my arrival at Point Orient.

Q. Captain, you have stated that these gentlemen represented the Standard Oil Company there; do you know, as a matter of fact, whether or not they also represented the charterer, the Vacuum Oil Company? A. I don't know.

Q. Did anybody else, other than these two gentlemen, talk with you about the cargo to be shipped on that voyage? A. No.

Cross-examination.

Mr. SUTRO.—Q. Captain, did you speak to Mr. Connolly first, or to Mr. Jones first?

A. Mr. Connolly first.

Q. Was anybody else present at that conversation?

A. Oh, quite a number of men were around there, working around the wharf. I don't know if anyone heard what we said or not; I could not say.

Q. Well, you know whether anyone else was present at the conversation?

A. There were some men around there, but I could not say who they were. There are always some men around there.

(Deposition of Charles Anderson.)

Q. That is not what I asked you, Captain: I asked you, was anybody else present at the conversation. A. No.

Q. How long since you have seen Mr. Connolly?

A. I have not seen him since we left there.

Q. Do you know where he is now?

A. I do not know where he is now.

Q. Have you inquired where he is?

A. No, sir. [163]

Q. What date did you say the "Commerce" arrived at Point Orient?

A. On the 16th of September.

Q. How soon after she arrived did you see Mr. Connolly?

A. I saw him right away, because he was taking the lines, making the ship fast.

Q. Did you go ashore, did you go on the pier, or dock, and tell him that she was ready to load, or did you communicate this to him from the ship?

A. He came on board.

Q. He came on board? A. Yes, sir.

Q. I thought you said there were a lot of men working around where the conversation was held?

A. Around the wharf, yes.

Q. Was the conversation on the wharf, or on the ship?

A. On the ship and on the wharf, both; I went ashore afterwards with him.

Q. Where was the conversation where you told him she was ready to load?

(Deposition of Charles Anderson.)

A. Well, he stood on the wharf then, and I spoke to him from the railing, and then he came right aboard.

Q. You spoke to him from the railing?

A. Yes, from the ship's deck.

Q. You yelled out to him, did you?

A. I didn't have to yell out to him, because the ship was right close to the wharf, and it was just as easy to speak to him there as it is to you now.

Q. Then when I asked you before where the conversation was, you said he came aboard?

A. He came aboard after I told him.

Q. What were the precise words you said to him, if you remmber?

A. I told him that the ship was ready for loading.

Q. That is not what you said, is it? What were the words you said?

A. I could not tell you exactly the expression I used, that is pretty hard for me to remember now. [164]

Q. But tell me just as nearly as you can remember.

A. I said the ship was ready for loading.

Q. But you didn't tell him that way; I mean what were the words you used?

A. I don't know that I could say anything else.

Q. You spoke to him, you addressed him, and you made some remark to him; now, do you remember what the remark was that you made to him?

A. The only thing, I probably asked him if he wanted to come on board and take a look at the dun-

(Deposition of Charles Anderson.)

nage. That is probably about the only remark I would make.

Q. With reference to loading, what was the remark you made?

A. I might have asked him if the cargo was ready.

Q. You asked him that? A. Yes, sir.

Q. What did he say? A. That is what I said.

Q. And what did he say?

A. He said the cargo was ready, the biggest part of it.

Q. You said? A. He said.

Q. But you don't remember what you said, what you asked him, what were the words you used?

A. I can't remember that.

Q. You can't remember that? A. No.

Q. You say he then went aboard the ship?

A. Yes, sir.

Q. And you showed him around the ship?

A. Yes, sir.

Q. You showed him the dunnage?

A. I showed him the dunnage.

Q. Was he alone?

A. He was alone, yes, sir.

Q. Did he go down into the hold?

A. Yes, sir.

Q. How soon after that was it that you saw Mr. Jones?

A. Well, I could not say how many days it was after that; it was inside of five days, anyway, five or six days.

Q. It was not the same day?

(Deposition of Charles Anderson.)

A. Not that I can remember; no, I don't think it was the same day.

Q. Where did you see M. Jones?

A. I saw him on the wharf first. [165]

Q. What was Mr. Jones doing?

A. Do you mean at that time?

Q. When you saw him.

A. He was just coming along the wharf when I spoke to him.

Q. Was he alone?

A. As near as I can remember.

Q. What time of the day was it?

A. I don't know.

Q. You don't know whether it was the morning or the evening? A. I could not say.

Q. How did you happen to be on the wharf?

A. Going and coming regularly, and looking around. I don't suppose I had any particular reason to be on the wharf that day.

Q. You say it might have been five days after the ship got there?

A. It might have been five days, yes.

Q. And you don't know what you were doing on the wharf?

A. I was not hunting for anything, that's sure.

Q. And you don't know what time of day it was?

A. No, that I don't remember.

Q. Did you speak to Mr. Jones, first, or did he speak to you?

A. I don't remember that, either.

(Deposition of Charles Anderson.)

Q. What did you say to him?

A. I told him that the ship was ready for loading.

Q. Is that all you said?

A. I might have said a good many other things, but I can't remember all that I said.

Q. You just went up to him and said the ship was ready for loading?

A. We might have had some conversation first about different things for all I remember; however, I notified him that the ship was ready for loading.

Q. I understand that, you have told me that. Do you remember any other part of the conversation?

A. No.

Q. You don't remember anything else you said to him?

A. Only if he would like to go and take a look at the hold, and he did so. [166]

Q. You asked him if he would like to go on board and take a look at the dunnage? A. Yes, sir.

Q. Was that said to him after you told him the ship was ready for loading?

A. That is something I could not answer; I don't remember that; the chances are we had a whole lot of talk.

Q. You said that, Captain, but you don't remember any of the talk. A. No.

Q. Nothing at all?

A. No, I can't remember what we talked about.

Q. Do you remember what words you used when

(Deposition of Charles Anderson.)

you spoke to him about the ship being ready, do you remember what you said?

A. I could not remember the expression; no.

Q. Was there anybody present at the conversation? A. No.

Q. Were there men around there working?

A. There are men around that wharf all the time.

Q. I didn't ask you that, Captain.

A. There were men around there then, but they didn't hear everything we said.

Q. There were men around there then?

A. Yes, sir.

Q. Do you remember where they were?

A. They were on the wharf.

Q. What were they doing?

A. I don't remember what they were doing.

Q. When you say there were men around there, have you the picture in your mind now that there were men around there?

A. There were men around the wharf.

Q. What were they doing?

A. I don't know. It was not my business to know that.

Q. Were they standing still?

A. They were working at something, I suppose.

Q. But you don't remember what? A. No.

Q. When he went aboard, did he look at the dunnage? A. Mr. Jones?

Q. Yes. A. Yes, sir.

Q. Was it he, or was it Mr. Connolly who told

(Deposition of Charles Anderson.)

you it was the finest dunnage he had ever seen?

A. Both of them said that. [167]

Q. Both of them said that? A. Yes, sir.

Q. Do you remember what they said?

A. They made the expression—of course, I could not use the exact words, but it was the best dunnage they had seen laid in this country.

Q. And Mr. Jones told you that, too?

A. Yes, he said so, too.

Q. You don't remember whether that was in the evening, or in the morning?

A. That I don't remember.

Q. Before you took the "Commerce" up to Point Orient, you telephoned to Mr. Jones, did you?

A. No, sir.

Q. You didn't telephone before you took her up there? A. No, sir.

Q. You know Mr. Jones quite well, don't you?

A. I had never met Mr. Jones before.

Q. You had never seen him before? A. No, sir.

Q. Do you know Mr. Connolly well?

A. No, I had not seen him before.

Q. Had you ever met Mr. Connolly before?

A. No.

Q. How did you know it was Mr. Connolly?

A. I found out his name afterwards.

Q. Who told you his name?

A. That I cannot remember; I was talking to him almost every day.

Q. What is that?

(Deposition of Charles Anderson.)

A. I was talking to him almost every day; that is how I found his name.

Q. Had you ever seen him before? A. No.

Q. You had never seen Mr. Connolly before that day?

A. I had never seen Mr. Connolly before that.

Q. Had you ever seen Mr. Jones before that?

A. No.

Q. The "Commerce" was the only schooner that was tied up there at that time, was she not?

A. Yes, at that time.

Mr. DENMAN.—At what time? [168]

Mr. SUTRO.—Now, just pardon me a moment.

Mr. DENMAN.—But you say, "at that time"; I think you should specify the time more particularly.

Mr. SUTRO.—You can straighten it out on redirect.

Mr. DENMAN.—But the time is not fixed in your question.

Mr. SUTRO.—Do you object to the question?

Mr. DENMAN.—Yes, I object to the question on the ground that the time is not fixed definitely, and I think the time should be fixed.

Mr. SUTRO.—Q. Who, if anybody, introduced Mr. Jones to you?

A. I don't know that anybody introduced me, as near as I can remember.

Q. What is that?

A. I say that as near as I can remember I don't think I got any introduction to him.

(Deposition of Charles Anderson.)

Q. That evening that you saw him, was that the first time you saw him, that day, or that time you saw him?

A. The first time I had ever seen Mr. Jones was then; I had never been to that wharf before.

Q. On the day that you spoke to him and told him that the cargo was ready, that is the first time you ever seen him?

A. Well, I would not say that. What I mean to say is, I never had seen Mr. Jones until the day I arrived there; and probably two or three days after I came there it was that I spoke to him.

Q. And told him that the cargo was ready?

A. Yes, sir.

Q. The first time you saw him, is when you told him the cargo was ready?

A. I might have seen him before; that I cannot remember.

Q. You never had spoken to him before?

A. No, sir.

Q. Was anybody present when you spoke to Mr. Jones? A. No.

Q. You know Mr. Kirchman, don't you?

A. Yes. [169]

Q. The gentleman sitting here? A. Yes.

Q. What are his initials? A. H., I believe.

Q. H. Kirschman? A. Yes.

Q. Is it H. Kirschman, Jr., or H. Kirschman? Which is it? I don't know which it is.

Mr. DENMAN.—Junior.

(Deposition of Charles Anderson.)

Mr. SUTRO.—Q. Have you discussed with Mr. Kirchman the testimony you are giving here to-day in this case?

A. No, sir.

Q. You never talked to him about it at all?

A. No, sir.

Q. Were you at Mr. Kirchman's office to-day?

A. Yes, sir.

Q. And did you discuss it with anybody there?

A. No, sir.

Q. Have you ever talked with anybody about your testimony? A. Not with anybody.

Q. You have not talked with Mr. Denman?

A. No.

Q. Or talked with Mr. Resleuer? A. No.

Q. You have not talked with anybody at all about the testimony that you are now giving? A. No.

Q. Who told you to come here to-day?

A. Mr. Kirschman.

Q. Did you ask him why you were to come?

A. I knew that before; he wired for me to come down.

Q. He wired you where?

A. To Aberdeen, for me to come here.

Q. What did he wire you?

A. To come down to San Francisco, stating about this case, with regard to the charter of the schooner "Commerce." That is all Mr. Kirschman said to me.

Q. That is the first time you knew that you were

(Deposition of Charles Anderson.)

to give your testimony in this case? A. Yes.

Q. Don't you know that it had been arranged that you were to give your testimony in this case about two or three weeks ago, or four weeks ago?

A. I don't know.

Q. You didn't know that? A. No, sir. [170]

Q. When did you sail for Aberdeen?

A. From here?

Q. Yes. A. I don't remember the date.

Q. It is about two or three weeks ago, isn't it?

A. No, it is five weeks ago, or more.

Q. What is that?

A. It is more than five weeks, perhaps. I was 24 days going up there.

Q. Had you not been told, just, before you left, that your deposition was to be taken in this case?

A. Oh, yes, I believe Mr. Kirschman said something about it, that he may send for me.

Q. That he may send for you?

A. Yes; that is what he told me, if I remember right now.

Q. Then he did talk to you about this thing?

A. Yes, sir.

Q. And you did talk to Mr. Kirchman about your testimony?

A. Not about my testimony. He just told me he might have to send for me to come down.

Q. Then, if I understand you right, nobody ever asked you whether you told anybody that the "Commerce" was ready to load at Point Orient?

(Deposition of Charles Anderson.)

A. Excuse me, I didn't get that.

Q. Nobody connected with this case, or with Sanders & Kirschman, or any of the attorneys, ever asked you whether you told anybody at Point Orient that the "Commerce" was ready to load?

A. Nobody ever asked me.

Q. And you never told anybody until you told us here to-day— A. (Intg.) No.

Q. (Continuing.) Wait a minute, Captain; that you had told Mr. Connolly that the "Commerce" was ready to load, and that you told Mr. Jones that the "Commerce" was ready to load: Is that correct?

A. Yes.

Q. That is correct? A. Yes.

Q. The number of the dock or wharf at which the "Commerce" was [171] made fast, you don't recall if there was any number on the wharf, at all. It is the inside wharf, that is all I do know about it.

Q. Did she remain in there until she sailed?

A. We were ordered to go over to the other wharf because we were in the way of some other vessel that wanted to get in there to load.

Q. Did she remain there?

A. She remained at that wharf; it is all one wharf. She didn't remain at that particular arm of the wharf.

Q. Where was she taken?

A. Just across to the outside. She was lying here like this, and we just pressed her over to that wharf.

(Deposition of Charles Anderson.)

Q. Do you know the initials of Mr. Jones?

A. No, sir, I don't.

Q. Do you know the initials of Mr. Connolly?

A. I do not.

Q. Have you seen Mr. Jones recently? A. No.

Q. Do you know where he is?

A. I have no idea where they are, either one of them.

Q. You have no idea where Mr. Jones is?

A. No, sir.

Q. You said that you were told that some of the case oil was in the shed or warehouse—what did you say about that, do you remember?

A. Yes, I was told there was some cargo in the shed.

Q. Who told you that? A. Mr. Connolly.

Q. Did you ask him?

A. I don't remember whether I asked him, or not; he might have told me without my asking him; that I could not say.

Q. You never saw him before, you say?

A. I never saw him before.

Q. Do you know whether or not it was Mr. Jones who told you that? A. Connolly told me first. [172]

Q. Did Jones tell you also?

A. I believe he told me afterwards.

Q. Jones told you also? A. Yes, sir.

Q. Was that the same day that you told him that the ship was ready to load?

(Deposition of Charles Anderson.)

A. That I cannot remember; I don't remember that.

Mr. SUTRO.—I think that is all.

Redirect Examination.

Mr. DENMAN.—Q. Do you know who Mr. Resleuer is? A. No, sir.

Q. Do you know this gentleman here, this lame gentleman right here? A. No.

Q. You have seen him before?

A. It seems to me I have seen him, yes.

Q. Do you remember coming to this office shortly after the "Commerce" was unable to get her cargo, and telling me about your experiences up there, along last fall some time? A. Yes.

Q. And this lame gentleman was here at the time?

A. It seems to me I remember that. Yes, I remember that, now.

Q. And telling us about your seeing Jones and Connolly at that time?

A. Yes, certainly I remember that; yes, I think of that now.

Q. That was some months ago?

A. I don't remember what time that was. I think that was before I went away on the last trip, come to think of it now. It was so long ago that I had forgotten all about it.

Q. How many times, altogether, did you see Mr. Jones there?

A. I saw him almost every day I was there.

Q. You saw him almost every day?

(Deposition of Charles Anderson.)

A. Nearly every day.

Q. What was he doing when you saw him?

A. He was in the office and along the wharf, attending to his work.

Q. And what was his work as you saw it? What did you see him do there?

A. I seen him doing some writing, and speaking on [173] the phone, etc., and getting orders and giving orders to the men around there more or less. I really don't understand his business, but I know he was busy with something. I didn't really pay much attention to him.

Q. Did you ever have any conversation with him regarding stevedores?

A. Yes, the first day, the first time, I believe, when I spoke to Mr. Jones, we spoke about stevedores.

Q. What did he say?

A. Well, he didn't seem to have anything to say. The stevedores were on strike, I believe, at that time.

Q. Did you have any talk with Mr. Connolly about stevedores?

A. We talked about it most every day, off and on, talking about labor and so on.

Q. You spoke of a strike; did you have any discussion with Mr. Connolly about the strike?

A. Yes, sir. [174]

Certificate of Commissioner to Deposition of Charles Anderson.

United States of America,
State and Northern District of California,
City and County of San Franicsco.—ss.

I certify that, in pursuance of stipulation of counsel, on Tuesday, September 7, 1920, before me, Francis Krull, a United States Commissioner for the Northern District of California at San Francisco, at the offices of William Denman, Esq., in the Merchants Exchange Building, in the City and County of San Francisco, State of California, personally appeared Charles Anderson, a witness called on behalf of the libelants in the cause entitled in the caption hereof; and William Denman, Esq., appeared as proctor for the libelants, and Alfred Sutro, Esq., appeared as proctor for the respondent, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause, deposed and said as appears by his deposition hereto annexed.

I further certify that the deposition was then and there taken down in shorthand notes by Charles R. Gagan, and thereafter reduced to typewriting; and I further certify that by stipulation of the proctors for the respective parties, the reading over of the deposition to the witness and the signing thereof were expressly waived.

And I do further certify that I have retained the said deposition in my possession for the purpose of

delivering the same with my own hands to the clerk of the United States District Court for the Northern District of California, the court for which the same was taken.

And I do further certify that I am not of counsel, nor [175] attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

And I further certify that on the following day, to wit, on Wednesday, September 8th, the said Charles Anderson appeared in my office and stated that he desired to correct his testimony; whereupon the following occurred:

The COMMISSIONER.—Q. What is it you want to say, Captain, with reference to correcting your deposition that was taken yesterday?

A. In regard to the question by the lawyer, when he asked me if I had been talking to anyone, or if anyone had been talking to me regarding the case. I understood him to ask me whether anyone had instructed me to say during the deposition, or the trial, or whatever you call it; that is what I understood him to ask me, and I answered "No"; I got confused.

Q. What is the fact?

A. The fact of the matter is that I was up to Mr. Denman's office and Mr. Denman asked me about it.

Q. When? A. Previously.

Q. How long before?

A. The same day, or the day before; the same day, I think it was.

Q. And what did you say to Mr. Denman in reference to your testimony?

A. I just told him about the case, how the things stood.

Q. What facts did you tell him?

A. About the time that we came up to the Point Orient wharf, and that she was read*ing* for loading, etc.—the different things.

Q. State exactly what you told him.

A. I told him the day we came to the wharf, and about the time of day, and about Mr. Connolly coming on board and looking at the dunnage, and [176] that Mr. Connolly found it correct; and also speaking to Mr. Jones.

Q. Is that as you testified here yesterday—I mean the facts that you testified to in your deposition yesterday you told to Mr. Denman before you gave your testimony under oath in this deposition?

A. Yes, sir.

IN WITNESS WHEREOF, I have hereunto set my hand in my office aforesaid this 10th day of Sept., 1920.

[Seal] FRANCIS KRULL,
United States Commissioner, Northern District of California, at San Francisco.

[Endorsed]: Filed Nov. 19, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [177]

In the District Court of the United States in and for the Southern Division of the Northern District of California, First Division.

IN ADMIRALTY—No. 16,701.

SAN MATEO R. & S. CO. et al.,

Libelants,

vs.

VACUUM OIL CO., PROPRIETARY, LTD.,

Respondent.

(Deposition of Alexander Beattie, Taken on Behalf of Libelants.)

BE IT REMEMBERED, that on Wednesday, October 22, 1919, pursuant to stipulation of counsel hereunto annexed, at the offices of William Denman, Esq., in the Merchants Exchange Building, in the City and County of San Francisco, State of California, personally appeared before me, Francis Krull, a United States Commissioner for the Northern District of California, authorized to take acknowledgments of bail and affidavits, etc., Alexander Beattie, a witness called on behalf of the libelant.

William Denman, Esq., appeared as proctor for the libelant, and Alfred Sutro, Esq., appeared as proctor for the respondent, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(It is hereby stipulated and agreed by and between the proctors for the respective parties that the deposition of the above named witness may be taken *de bene esse* on behalf of the libelant at the offices of William Denman, Esq., in the Merchants Exchange Building, in the City and County of San Francisco, State of California, on Wednesday, October 22, 1919, before Francis Krull, [178] a United States Commissioner for the Northern District of California and in shorthand by Charles R. Gagan.

(It is further stipulated that the deposition, when written up, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as materiality and competency of the testimony are reserved to all parties.

(It is further stipulated that the reading over of the testimony to the witness and the signing thereof are hereby expressly waived.

(It is stipulated that the Vacuum Oil Company, Proprietary, Ltd., designated as the respondent herein, does not by appearing at the taking of this deposition through Messrs. Pillsbury, Madison & Sutro, represented by Adolph Sutro, attorneys, enter an appearance in this libel, and that any question regarding the jurisdiction of the above-entitled court over said respondent is reserved to said respondent,

(Deposition of Alexander Beattie.)

and that the interrogation by way of cross-examination by Mr. Alfred Sutro of the witness who has been sworn shall not in any manner or wise prejudice any question regarding the jurisdiction of the above-entitled court over said respondent.

(It is further stipulated that in the event that jurisdiction is properly procured over the respondent in the case, the deposition shall not be objected to upon the ground of any present absence of jurisdiction; that no claim of jurisdiction shall be made by the libelants based upon the appearance of Mr. Sutro or his firm at this time, or unless jurisdiction over the respondent has already been properly obtained.) [179]

ALEXANDER BEATTIE, called for libelant, sworn.

Mr. DENMAN.—Q. Captain Beattie, what is your occupation? A. Master mariner.

Q. How long have you been a master mariner?

A. I have been master for about twenty years, in the neighborhood of twenty years.

Q. Where are you sailing now?

A. I am master of the schooner "Luzon," on the way to New Zealand.

Q. When do you expect to have her loaded?

A. Well, Friday, I guess.

Q. And you will sail shortly after that?

A. Saturday, or maybe I won't get away until Sunday.

Q. Do you know Mr. Henry Kirschman, who is seated here on my right?

(Deposition of Alexander Beattie.)

A. Yes; he is my managing owner.

Q. And Mr. Blumer, who is seated on my left?

A. I have met the gentleman.

Q. Were you in the office of the Vacuum Company in the Mills Building, on the morning of September 16, 1919? A. Yes, sir.

Q. At about what hour?

A. In the neighborhood of eleven o'clock.

Q. Who were present at that time?

A. Mr. Blumer, Mr. Kirschman and I.

Q. What took you to that office?

A. We were there on business connected with the "Luzon."

Q. Did you hear any conversation between Mr. Kirschman and Mr. Blumer concerning the schooner "Commerce"? A. Yes, sir.

Q. Can you tell us what that conversation was?

A. Mr. Blumer asked Mr. Kirschman how he "Commerce" was getting on for loading, and he told him that the tugboat had been ordered that morning at daylight, and that she was either up or on her way up the river to load.

Q. What happened then?

A. Mr. Kirschman asked him if there was any further notice with regard to the loading of the vessel, and he said, no, that that is all that was necessary. [180]

Q. Did anything else transpire with reference to the schooner "Commerce" in that conversation?

A. I think that is about all; we were there on

other business, of course, and that came in between.

Mr. DENMAN.—That is all.

Mr. SUTRO.—No cross-examination. [181]

Certificate of Commissioner to Deposition of Alexander Beattie.

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I certify that, in pursuance of stipulation of counsel, on Wednesday, October 22, 1919, before me, Francis Krull, a United States Commissioner for the Northern District of California, at San Francisco, at the offices of William Denman, Esq., in the Merchants Exchange Building, in the City and County of San Francisco, State of California, personally appeared Alexander Beattie, a witness called on behalf of the libelants in the cause entitled in the caption hereof; and William Denman, Esq., appeared as proctor for the libelants, and Alfred Sutro, Esq., appeared as proctor for the respondent, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause, deposed and said as appears by his deposition hereto annexed.

I further certify that the deposition was then and there taken down in shorthand notes by Charles R. Gagan, and thereafter reduced to typewriting; and I further certify that by stipulation of the proctors for the respective parties, the reading over of the

deposition to the witness and the signing thereof were expressly waived.

And I do further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hands to the clerk of the United States District Court for the Northern District of California, the court for which the same was taken.

And I do further certify that I am not of counsel, nor attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named [182] in the said caption.

IN WITNESS WHEREOF, I have hereunto set my hand in my office aforesaid, this 10th day of Sept., 1919.

[Seal] FRANCIS KRULL,
United States Commissioner, Northern District of California, at San Francisco.

[Endorsed]: Filed Nov. 19, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [183]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY.

SAN MATEO REALTY & SECURITY COMPANY,

Libelant,

vs.

VACUUM OIL COMPANY, P'T'Y, LTD.,

Respondent.

(Deposition of Henry Kirschman, Jr., Taken on Behalf of Libelant.)

BE IT REMEMBERED, that on Thursday, January 6, 1921, pursuant to stipulation of counsel hereunto annexed, at the offices of William Denman, Esq., in the Merchants Exchange Building, in the City and County of San Francisco, State of California, personally appeared before me, Francis Krull, a United States Commissioner for the Northern District of California, authorized to take acknowledgments of bail and affidavits, etc., Henry Kirschman, Jr., a witness called on behalf of the libelant.

J. F. Resleure, Esq., appeared as proctor for the libelant, and Alfred Sutro, Esq., appeared as proctor for the respondent, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing

(Deposition of Henry Kirschman, Jr.)
but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(It is hereby stipulated and agreed by and between the proctors for the respective parties that the deposition of the above-named witness may be taken *de bene esse* on behalf of the libelant at the offices of William Denman, Esq., in the Merchants Exchange Building, in the City and County of San [184] Francisco, State of California, on Thursday, January 6, 1921, before Francis Krull, a United States Commissioner for the Northern District of California, and in shorthand by Charles R. Gagan.

(It is further stipulated that the depositions, when written up, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as to materiality and competency of the testimony are reserved to all parties.

(It is further stipulated that the reading over of the testimony to the witness and the signing thereof are hereby expressly waived.) [185]

HENRY KIRSCHMAN, Jr., called for libelant, sworn.

Mr. RESLEURE.—Q. Mr. Kirschman, you reside in the City and County of San Francisco?

A. I do.

(Deposition of Henry Kirschman, Jr.)

Q. And you are leaving for the Philippines on the 9th of this month? A. I am.

Q. What is your occupation? A. Lumberman.

Q. Have you any other occupation?

A. Also a director in Sanderson & Kirschman, Inc.

Q. Were you a director in Sanderson & Kirschman in the fall of 1919? A. I was.

Q. Do you know Captain Alexander Beattie?

A. I do.

Q. Who is he?

A. He is the master of the schooner "Luzon."

Q. Do you know Mr. Bloomer? A. Yes, sir.

Q. Were you in the office of the Vacuum Oil Company, Pty, Ltd., in the Mills Building, on September 16, 1919?

A. I was in Mr. Bloomer's office, and I understand that that is also the office of the Vacuum Oil Company.

Q. At what time were you there on that day?

A. In the forenoon of September 16, 1919.

Q. Do you know about what time?

A. It was between the hours of, say, 9 and 12.

Q. Who were present at that time?

A. Mr. Bloomer, Captain Beattie and myself.

Q. What was the nature of your business there?

A. We were over to see Mr. Bloomer in connection with the business of the schooner "Luzon."

Q. While you were there, did you have any conversation with Mr. Bloomer in regard to the schooner "Commerce"?

(Deposition of Henry Kirschman, Jr.)

A. Yes. I introduced Captain Beattie as the master of the schooner "Luzon," [186] and then Mr. Bloomer asked me about the "Commerce," how the "Commerce" was getting along loading, and I told him that the towboat had been ordered to take her up to the river that morning, up to the oil wharf that morning, and that she was either up there or en route up there.

Q. Was anything further said?

A. Then Mr.—now, wait a minute; just ask me that question again; I didn't quite get that.

Q. Did you say anything further, beyond that the schooner was up, or going up?

A. That she was up, or going up to load, and I asked Mr. Bloomer if he required any further notice with reference to her loading, and he answered "No," that that was all that would be necessary.

Q. Was that all that transpired in regard to the "Commerce"?

A. That is all that transpired with reference to the "Commerce," as our business was in reference to the "Luzon."

Q. Prior to that time, did you ever have any conversation with Mr. Bloomer with regard to the readiness of the "Commerce" to load?

A. No, there was no occasion to talk of her readiness to load, as we were repairing the boat and getting her ready prior to that time.

Q. Did you ever speak to Mr. Bloomer in regard to the "Commerce" before that time?

A. Yes, I spoke to Mr. Bloomer, and also to Mr.

(Deposition of Henry Kirschman, Jr.)

Slingerland, of the Standard Oil Company.

Q. Was that conversation to them personally, or was it by phone?

A. It would either be by phone, or when meeting them on the floor of the Merchants Exchange.

Q. Do you remember the nature of any of the conversations you had?

A. Authentically, no, except that I would be asked from time to time when the boat would be ready to load, as they [187] would naturally want to know, to have their cargo ready.

Mr. RESLEURE.—I think that is all, Mr. Sutro.

Cross-examination.

Mr. SUTRO.—Q. You were present, Mr. Kirschman, when the deposition of Captain Beattie was taken in this cause on October 22, 1919, were you not?

A. At this office, yes, if that is the deposition.

Q. His deposition was taken only once, and you were present on that occasion?

A. I was present at that time; yes.

Q. Have you ever seen a transcription of the testimony of Captain Beattie? A. I have.

Q. When did you last see it? A. To-day.

Q. When, to-day?

A. About 10 or 15 minutes ago.

Q. Did you read it over? A. I read it over.

Q. Did you read it over carefully?

A. I read it over.

Q. Who showed it to you? A. Mr. Resleure.

Q. Did you ask to see it?

(Deposition of Henry Kirschman, Jr.)

A. Yes, I asked to see it.

Q. How did you know it was here?

A. I naturally expected that it would be here with the attorney.

Q. Didn't Mr. Resleure show it to you and tell you he had it? A. No, I asked for it.

Q. How long are you going to be gone to the Philippines?

A. I think from three to four months.

Mr. SUTRO.—That is all. [188]

Certificate of Commissioner to Deposition of Henry Kirschman, Jr.

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I certify that, in pursuance of stipulation of counsel, on Thursday, January 6, 1921, before me, Francis Krull, a United States Commissioner for the Northern District of California, at San Francisco, at the offices of William Denman, Esq., in the Merchants Exchange Building, in the City and County of San Francisco, State of California, personally appeared Henry Kirschman, Jr., a witness called on behalf of the libelant in the cause entitled in the caption hereof; and J. F. Resleure, Esq., appeared as proctor for the libelant, and Alfred Sutro, Esq., appeared as proctor for the respondent, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said

cause, deposed and said as appears by his deposition hereto annexed.

I further certify that the deposition was then and there taken down in shorthand notes by Charles R. Gagan, and thereafter reduced to typewriting; and I further certify that by stipulation of the proctors for the respective parties, the reading over of the deposition to the witness and the signing thereof were expressly waived.

And I do further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hands to the Clerk of the United States District Court for the Northern District of California, the court for which the same was taken.

And I do further certify that I am not of counsel, nor attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in the [189] said caption.

IN WITNESS WHEREOF, I have hereunto set my hand in my office aforesaid this 18th day of Jany., 1921.

[Seal] FRANCIS KRULL,

United States Commissioner, Northern District of California, at San Francisco. [190]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,701.

SAN MATEO REALTY & SECURITY COMPANY, a Corporation, et al., etc.,

Libelants,

vs.

VACUUM OIL CO., PROPRIETARY, LTD.,

Respondent.

Stipulation for Taking Deposition De Bene Esse.

IT IS HEREBY STIPULATED AND AGREED by and between the proctors for the parties above named that the deposition of Henry Kirchmann, Jr., may be taken *de bene esse* on behalf of the Libelants above named at the office of William Denman, Esq., at Room 818, Merchants Exchange Building, in the City and County of San Francisco, State of California, on Thursday, January 6th, 1921, at the hour of two o'clock P. M. on the said day, before Francis Krull, Esq., a commissioner duly appointed by the above-entitled court.

Dated, January 4th, 1920.

WILLIAM DENMAN,
Proctors for Libelants.

PILLSBURY, MADISON & SUTRO,
Proctors for Respondent.

[Endorsed]: Filed Mar. 1, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [191]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,701.

SAN MATEO REALTY & SECURITY COMPANY, a Corporation, D. VON der MEHDEN, HENRY FRISCHE, CHAS. NONNENMANN, HENRY WELLMAN, LILLY BRUCKMANN, C. ZEUTHEN, CARL VON der MEHDEN, ROBT F. ELDER, C. F. LURMANN, BETTY VON CLEVE, TILLMAN & BENDEL, a Corporation, CLARA OLIVER, F. B. KLOPPER, LOUISE SCHNABEL, SANDERS & KIRCHMANN, INC., a Corporation, and SCHOONER OWNERS COMPANY, a Corporation, Owners of the American Schooner, "COMMERCE,"

Libelants,

vs.

VACUUM OIL CO., PROPRIETARY, LTD.,

Respondent.

Decision.

Filed June ——, 1921.

(OPINION—ORDERING DECREE FOR LIBELANTS.)

WILLIAM DENMAN and McCLANAHAN & DERBY, Proctors for Libelants.

PILLSBURY, MADISON & SUTRO, Proctors for Respondent.

NETERER, District Judge.

This is a libel *in personam* to recover damages for alleged wrongful cancellation of a charac*t*er-party by the respondent upon the schooner "Commerce." The charter-party was made November 19, 1918. Among the provisions bearing upon this issue is "the vessel shall haul to such loading berth * * * as may be designated by the charterer or his agents * * * ," and "it is agreed that the lay-days for loading shall be * * * —commencing when the vessel is ready to receive cargo * * * and if the vessel is not ready to load by 2 o'clock P. M., on the 130 day after sailing for San Francisco, the charterer shall have the opinion of cancellating or maintaining this charter. * * * " There is also a demurrage clause providing for $200.00 per day. The 130 days would carry the cancelling date to October 6th. At the time of making this charter-party a number of vessels between the same parties were under charter. [192] The charter-party was negotiated by A. E. Wolff, representing the owners, and by the Standard Oil Co. representing the charterers. On this date vessels were scarce and in demand, and the rates were high. Soon thereafter rates began to fall, and in October had fallen from $1.37½ to 70 cents a case for oil and from $27.00 per thousand to $15.00 per thousand for lumber. On October 11th, the respondent sent a note to the owners advising that the charter was cancelled, claiming no notice of readiness having been given.

The issue is a question of fact. It is conceded that the schooner returned to San Francisco sometime prior to September 13th, and went on drydock; that considerable communication by phone and correspondence was had between the owners and the Standard Oil Co.; that on September 4th, the Standard Oil Co. wrote a letter to the owners, directing that hereafter they communicate directly with C. A. Blumer; that on or after September 13th, Kirchmann, Sr., inquired of Mr. Blumer where the "Commerce" was to load. Blumer stated that he would find out and after inquiry from Mr. Slingerland's department of the Standard Oil Co., "found the cargo was on the Point Orient Wharf, and I telephoned Mr. Kirchmann to that effect"; that on September 16th, the surveyor's report of the vessel's fitness was delivered to Mr. Blumer. The witness Blumer testified that the vessel was "fit for anything." Question: "For the intended voyage?" Answer: "Yes." At Point Orient, Jones was head wharfinger, and had charge of the wharf and of the delivery of cargoes to ships tackle. Connolly was the labor foreman and acted under orders from Jones. The cargo was ready and the ship was ready and lay alongside. Jones, the wharfinger, and Connolly, the labor foreman, knew the ship was there. There were no other representatives [193] of the charterer at Point Orient wharf. Slingerland when asked why cargo was not delivered said "the ship never called for it; she just lay there doing nothing." During the time the "Commerce" was lying at Point Orient wharf there was a stevedore strike,

and Slingerland in answer to the following question made the following answer: "Do you remember some time around September 18th or 20th, 1919, having a telephone conversation with Mr. Wolff with reference to the 'Commerce,' in which it was mutually understood over the telephone that it would be inadvisable to employ * * * non-union men in loading the 'Commerce' because the 'Jewett' was loading with union men, and that you said to Mr. Wolff, 'For God's sake, Wolff, don't send non-union men up here until the 'Jewett' is through. Stevenson is working here with union men and there would be trouble if at the same time you had non-union men on the 'Commerce' at the same berth?" Answer: "I was handling the situation with all ships along those lines at that time; in other words, when a union gang got away we would take on a ship that wanted to work with a non-union gang. The reason should be very apparent to you that we did not want to cause a fracas or a mixup on our property between non-union and union-men. If Mr. Wolff says he took that up with me it probably may have happened because it was a daily occurrence with everybody." Witness further stated he would not contradict the statement of Mr. Wolff, who said: Question: "Mr. Wolff, are you familiar with the stevedoring situation in September, 1919, at the time that the 'Commerce' went to Point Orient Dock for loading?" Answer: "Yes, sir." Question: "Would it have been possible to secure stevedores to load the 'Commerce' at that time?" Answer: "Yes." Question: "Do you re-

member having a conversation over the telephone about that time [194] with Mr. Slingerland with reference to stevedoring the 'Commerce'?" Answer: "I do." Question: "State to the Court the substance of that conversation as you remember it." Answer: "In essence I told Mr. Slingerland that Sanders & Kirchmann, the owners, naturally wanted to work the ship with non-union men if they could. This was just shortly after the ship went up there. The 'Jewett' was working then with non-union men. Slingerland over the telephone said—he was quite excited—in essence, 'For God's sake, Wolff, don't send non-union men up there while the 'Jewett' is there. Stevenson is working her with union men, and we don't want to have friction on our property."

I am satisfied the Standard Oil Co. was notified that the vessel was at the wharf, fit and ready for cargo; that Blumer knew the vessel was at the wharf and fit and ready for loading. I also believe that from the conversation between Kirchmann and Blumer on September 16th in the presence of Captain Beattie of the "Luzon," that Kirchmann was lead to believe that express notice of readiness was not necessary. Kirchmann and Captain Beattie positively so swear. Blumer says nothing was said about the "Commerce,' "So far as I am aware of." From a consideration of all the evidence, I think it very likely that such a conversation should be had. There was a serious stevedoring situation because of the strike. The Standard Oil Co. who was furnishing cargo, as well as the owners, were much con-

cerned about the strike situation. The relation between all parties was friendly and the parties to this proceeding seemed to understand each other and co-operate at the time. The charterer was no doubt desirous of cancelling the charter-party, and from what did take place between the parties I can readily understand that the owners were lulled into a feeling [195] of security that formal notice of readiness was considered given or waived. The letter of September 4th from Mr. Slingerland that further details should be taken up with Blumer must be considered with the further future conduct of Blumer and the representatives of the Standard Oil Co., with relation to the loading, and stevedoring strike, and all of the surrounding circumstances that bear upon the situation. From all these I am convinced that the Standard Oil Co. still maintained a relation to the charterer beyond that of merely furnishing cargo, and knew, and that Blumer knew, that the vessel was fit and ready for cargo and was at Point Orient wharf, and that demand was made at Point Orient wharf, the proper berth, and also of the Standard Oil Co. at its offices. The fact that a claim for demurrage was not made under the circumstances and facts in this case should not prevent recovery. Omission to demand the "pound of flesh" under all the circumstances should not defeat a claim established as I believe this to be.

Footnote, p. 128, Scrutton on Charter-parties and Bills of Lading, says:

> "If the charterers are proved to be otherwise aware of the readiness to load, I do not think express notice would be required."

Decree for libelant.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed June 11, 1921. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [196]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,701.

SAN MATEO REALTY & SECURITY COMPANY, a Corporation, D. VON der MEHDEN, HENRY FRISCHE, CHAS. NONNENMANN, HENRY WELLMAN, LILLY BRUCKMANN, C. ZEUTHEN, CARL VON der MEHDEN, ROBT. F. ELDER, C. F. LURMANN, BETTY VON CLEVE, TILLMANN & BENDEL, a Corporation, CLARA OLIVER, F. B. KLOPPER, LOUISE SCHNABEL, SANDERS & KIRCHMANN, INC., a Corporation, and SCHOONER OWNERS COMPANY, a Corporation, Owners of the American Schooner "COMMERCE,"

Libelants,

vs.

VACUUM OIL CO., PROPRIETARY, LTD.,
Respondent.

H. W. WESTPHAL (Substituted for SAN MATEO REALTY & SECURITY COMPANY (a Corporation), and THUSNELDA WILKENS (Substituted for TILLMAN & BENDEL, a Corporation),

Substituted Libelants.

Decree.

This cause coming on duly to be heard, and evidence, both oral and by deposition, having been presented to the Court by the respective parties, and the cause having been submitted to the Court on briefs, and the Court being fully advised in the premises, and having rendered and filed its decision and opinion herein on the 11th day of June, 1921, the Court now finds the ultimate facts to be as follows: [197]

I.

That prior to the filing of the libel herein, the said San Mateo Realty & Security Company, a corporation, assigned its interest in the Schooner "Commerce" and in this suit to H. W. Westphal, and said H. W. Westphal has been substituted as a party libelant herein for said San Mateo Realty & Security Company, a corporation, and that said Tillman & Bendel, a corporation, assigned its interest in said schooner "Commerce" and in this suit to Thusnelda Wilkens, and said Thusnelda Wilkens has been substituted as a party libelant herein for said Tillman & Bendel.

II.

That the charter-party herein sued upon was made and executed as alleged in said libel.

III.

That all the terms and conditions of the said charter-party on the part of the libelants to be performed have, by them, been performed, including *inter alios:*

(a) The giving of notice of readiness to load said vessel prior to the cancelling date of said charter-party;

(b) The said vessel being at all times from and after the 16th day of September, 1919, and prior to said cancelling date, fit and ready in berth to load the intended cargo.

IV.

That respondent on the 16th day of September, 1919, waived the requirement of said charter-party as to notice of readiness to load.

V.

That libelants have suffered damage by the non-performance of the said charter-party by the respondent in the sum of Seventeen Thousand Four Hundred Ninety-two and 32/100 Dollars ($17,492.32), as of October 11th, 1919, which sum is wholly unpaid. [198]

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that said H. W. Westphal may be substituted as a party libelant for said San Mateo Realty & Security Company, a corporation, and the amended libel amended accordingly; that said Thusnelda Wilkens may be substituted for said Tillman & Bendel, a corporation, and the amended libel amended accordingly; that the libelants, H. W. Westphal, D. Von der Mehden, Henry

Frische, Chas. Nonnenmann, Henry Wellman, Lily Bruckmann, C. Zeuthen, Carl Von der Mehden, Robt. F. Elder, C. F. Lurmann, Betty Von Cleve, Thusnelda Wilkens, Clara Oliver, F. B. Klopper, Louise Schnabel, Sanders & Kirchmann, Inc., a Corporation, and Schooner wners Company, a Corporation, owners of the American schooner "Commerce," have and recover from the respondent, Vacuum Oil Co., Proprietary, Ltd., the aforesaid sum of Seventeen Thousand Four Hundred Ninety-two and 32/100 Dollars ($17,492.32), the damages sustained by libelants on account of said nonperformance of the said charter-party by respondent, together with interest at the rate of seven per cent per annum on all of said damages from the 11th day of October, 1919 (the date of the cancellation of said charter-party by said respondent), with costs to be herein taxed against said respondent.

Dated, June 21st, 1921.

M. T. DOOLING,
District Judge.

[Endorsed]: Due service and receipt of a copy of the within proposed decree is hereby admitted this —— day of ——, 19—.

PILLSBURY, MADISON & SUTRO,
Attorneys for Respondent.

Filed Jun. 21, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Entered in Vol. 11 Judg. and Decrees, at page 42.

[199]

In the Southern Division of the District Court of the United States in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,701.

SAN MATEO REALTY & SECURITY COMPANY, a Corporation, D. VON der MEHDEN, HENRY FRISCHE, CHAS. NONNENMANN, HENRY WELLMAN, LILLY BRUCKMANN, C. ZEUTHEN, CARL VON der MEHDEN, ROBT. F. ELDER, C. F. LURMANN, BETTY VON CLEVE, TILLMAN & BENDEL, a Corporation, CLARA OLIVER, F. B. KLOPPER, LOUISE SCHNABEL, SANDERS & KIRCHMANN, INC., a Corporation, and SCHOONER OWNERS COMPANY, a Corporation, Owners of the American Schooner "COMMERCE,"

Libelants,

vs.

VACUUM OIL CO., PROPRIETARY, LTD.,

Respondent.

Notice of Appeal.

To the Clerk of the Above-entitled Court, to the Libelants Above Named, to H. W. Westphal and Thusnelda Wilkens, Substituted as Parties Libelant Herein in the Place and Stead of San Mateo Realty & Security Company, a Corporation, and of Tillman & Bendel, a Corporation,

Respectively, and to William Denman, Esq., and Messrs. McClanahan & Derby, Proctors for said Libelants:

You and each of you will please TAKE NOTICE that the Vacuum Oil Company, Proprietary, Ltd., a corporation, the respondent above named, hereby appeals from the final decree made and entered in this cause on the 21st day of June, 1921, to the United States [200] Circuit Court of Appeals, for the Ninth Circuit, to be holden in and for said Circuit at the City and County of San Francisco, State of California.

Dated: September 16, 1921.

PILLSBURY, MADISON & SUTRO,
Proctors for Respondent.

[Endorsed]: Receipt of a copy of the within notice of appeal is hereby acknowledged this 16th day of July, 1921.

WILLIAM DENMAN,
Proctor for Libelants.

Filed Sep. 16, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [201]

In the Southern Division of the District Court of the United States in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,701.

SAN MATEO REALTY & SECURITY COMPANY, a Corporation, D. VON der MEHDEN, HENRY FRISCHE, CHAS. NONNENMANN, HENRY WELLMAN, LILLY BRUCKMANN, C. ZEUTHEN, CARL VON der MEHDEN, ROBT. F. ELDER, C. F. LURMANN, BETTY VON CLEVE, TILLMANN & BENDEL, a Corporation, CLARA OLIVER, F. B. KLOPPER, LOUISE SCHNABEL, SANDERS & KIRCHMANN, INC., a Corporation, and SCHOONER OWNERS COMPANY, a Corporation, Owners of the American Schooner "COMMERCE,"

Libelants,

vs.

VACUUM OIL CO., PROPRIETARY, LTD.,

Respondent.

Assignments of Error.

Comes now the Vacuum Oil Company, Proprietary, Ltd., a corporation, respondent and appellant herein, and contends that in the record, opinion, decision and final decree in this cause there is manifest and material error, and said respondent and appellant now makes, files and presents the follow-

ing assignments of error on which it relies, to wit:

I.

That the District Court erred in rendering and entering the final decree herein, dated June 21, 1921.

II.

That the District Court erred in not dismissing the libel herein, with costs to the libelants, as prayed for in the [202] respondent's answer, and in not granting to the respondent a decree of dismissal herein, with its costs as prayed for.

III.

That the District Court erred in rendering and entering any decree in favor of the libelants herein, because the libelants never notified the respondent, expressly or otherwise, that the "Commerce" was ready to load, and because the respondent, on October 11, 1919, gave notice to the libelants of the cancellation of the charter-party of the said vessel, at which time the libelants had not notified the respondent that the "Commerce" was ready to load.

IV.

That the District Court erred in rendering and entering any decree in favor of the libelants herein, because the "Commerce" was not ready to load until long after the 6th day of October, 1919, that being the cancelling date in the charter-party of said vessel, and respondent having given to the libelants notice of cancellation of the charter-party of said vessel on October 11, 1919, and long before the "Commerce" was ready to load.

V.

That the District Court erred in holding and deciding that express notice of readiness of the "Commerce" to load was unnecessary.

VI.

That the District Court erred in holding and deciding that express notice of readiness to load ever was given on behalf of the schooner "Commerce" to the respondent, or to anyone by it authorized in that behalf, on or prior to October 6, 1919, that [203] being the cancelling date in the charter-party of said vessel.

VII.

That the District Court erred in holding and deciding that the Standard Oil Company was notified that the "Commerce" was at the Point Orient wharf, fit and ready for cargo, on or prior to October 6, 1919, that being the cancelling date in the charter-party of said vessel.

VIII.

That the District Court erred in holding and deciding that Blumer, the agent of the respondent, knew that the "Commerce" was at the Point Orient wharf, fit and ready for cargo, on or prior to October 6, 1919, that being the cancelling date in the charter-party of said vessel.

IX.

That the District Court erred in holding and deciding that, from the conversation between Kirchmann, Jr., and Blumer on September 16, 1919, in the presence of Captain Beattie, of the "Luzon," Kirchmann, Jr., was led to believe that express

notice to the respondent that the "Commerce" was ready to load was not necessary.

X.

That the District Court erred in holding and deciding that the Standard Oil Company, after the 4th day of September, 1919, still maintained any relation whatever to the respondent beyond that of merely furnishing cargo.

XI.

That the District Court erred in holding and deciding that demand for cargo was made on behalf of the libelants at the Point Orient wharf. [204]

XII.

That the District Court erred in holding and deciding that demand for cargo was made upon the Standard Oil Company at its offices or elsewhere.

XIII.

That the District Court erred in holding and deciding that the respondent was, by express notice or otherwise, proved to be aware of the readiness of the schooner "Commerce" to load.

XIV.

That the District Court erred in holding, deciding and decreeing that the charter-party herein sued upon was made and executed as alleged in the libel herein.

XV.

That the District Court erred in holding, deciding and decreeing that all, or any, of the terms and conditions of the charter-party of the schooner "Commerce," on the part of the libelants to be performed, have by them been performed.

XVI.

That the District Court erred in holding, deciding and decreeing that the libelants performed the terms and conditions of the charter-party of the "Commerce" relating to the giving of notice of readiness to load said vessel prior to the cancelling date of said charter-party.

XVII.

That the District Court erred in holding, deciding and decreeing that the "Commerce" was at all times or at any time, from and after the 16th day of September, 1919, and prior to the cancelling date fixed by the charter-party, fit and ready, [205] in berth to load the intended cargo.

XVIII.

That the District Court erred in holding, deciding and decreeing that the respondent, on the 16th day of September, 1919, or at any time, waived the requirement of the charter-party of the "Commerce" as to notice of readiness to load.

XIX.

That the District Court erred in holding, deciding and decreeing that the charter-party of the "Commerce" was not performed by the respondent.

XX.

That the District Court erred in holding, deciding and decreeing that the libelants have suffered damage in the sum of Seventeen Thousand Four Hundred Ninety-two and 32/100 Dollars ($17,492.32), or in any other sum, as of October 11, 1919, or as of any other time, by reason of the nonperformance

by the respondent of the charter-party of the "Commerce," or of any term or condition thereof.

XXI.

That the District Court erred in holding, deciding and decreeing that the libelants recover interest on the sum of Seventeen Thousand Four Hundred Ninety-two and 32/100 Dollars ($17,492.32) at the rate of seven (7) per cent per annum, or at any other rate, from the 11th day of October, 1919, or from any other time.

PILLSBURY, MADISON & SUTRO,
Proctors for Respondent.

[Endorsed]: Filed Sep. 16, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [206]

In the Southern Division of the District Court of the United States in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,701.

SAN MATEO REALTY & SECURITY COMPANY, a Corporation, D. VON der MEHDEN, HENRY FRISCHE, CHAS. NONNENMANN, HENRY WELLMAN, LILLY BRUCKMANN, C. ZEUTHEN, CARL VON der MEHDEN, ROBT. F. ELDER, C. F. LURMANN, BETTY VON CLEVE, TILLMANN & BENDEL, a Corporation, CLARA OLIVER, F. B. KLOPPER, LOUISE SCHNABEL, SANDERS &

KIRCHMANN, INC., a Corporation, and SCHOONER OWNERS COMPANY, a Corporation, Owners of the American Schooner "COMMERCE,"

Libelants,

vs.

VACUUM OIL CO., PROPRIETARY, LTD.,

Respondent.

Stipulation and Order Regarding Original Exhibits on Appeal.

It is hereby STIPULATED and AGREED by and between the respective parties hereto that all exhibits introduced in evidence upon the trial of the above-entitled cause in the District Court may be sent up in connection with the appeal presented herein as original exhibits to the United States Circuit Court of Appeals for the Ninth Circuit, instead of being copied in the Apostles on Appeal.

Dated: September 16th, 1921.

WILLIAM DENMAN,

Proctor for the Libelants.

PILLSBURY, MADISON & SUTRO,

Proctors for the Respondent.

It is so ordered.

M. T. DOOLING,

District Judge. [207]

[Endorsed]: Filed Sep. 16, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [208]

Certificate of Clerk U. S. District Court to Apostles on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 208 pages, numbered from 1 to 208, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of San Mateo Realty & Security Company, a Corp., et al., vs. Vacuum Oil Company, Proprietary, Ltd., No. 16,701, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for apostles on appeal (copy of which is embodied herein), and the instructions of the proctors for respondent and appellant herein.

I further certify that the cost for preparing and certifying the foregoing apostles on appeal is the sum of Eighty-three Dollars and Ninety-five Cents ($83.95), and that the same has been paid to me by the proctors for respondent herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 13th day of October, A. D. 1921.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [209]

[Endorsed]: No. 3785. United States Circuit Court of Appeals for the Ninth Circuit. Vacuum Oil Company, Proprietary, Ltd., a Corporation, Appellant, vs. H. W. Westphal, D. Von der Mehden, Henry Frische, Chas. Nonnemann, Henry Wellman, Lilly Bruckmann, C. Zeuthen, Carl Von der Mehden, Robert F. Elder, C. F. Lurmann, Betty Von Cleve, Thusnelda Wilkens, Clara Oliver, F. B. Klopper, Louise Schnabel, Sanders & Kirchmann, Inc., a Corporation, and Schooner Owners Company, a Corporation, Owners of the American Schooner "Commerce," Appellees. Apostles on Appeal. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed October 13, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3785.

VACUUM OIL CO., PROPRIETARY, LTD.,
Appellant,

vs.

H. W. WESTPHAL et al.,
Appellees.

Stipulation Regarding New Proofs on Appeal.

It is hereby STIPULATED and AGREED by and between the respective parties hereto as follows:

That the "Jewett" arrived at the dock of the Standard Oil Company at Point Orient, California, on September 29, 1919, at the hour of 4:45 P. M.; that said vessel commenced loading on September 30, 1919, at the hour of 10:45 A. M., and completed loading on October 3, 1919, at the hour of 3:30 P. M.; that said vessel left said Point Orient dock on October 4, 1919, at the hour of 9:20 A. M.

It is further STIPULATED and AGREED that this stipulation may serve in the place of the new proofs which, by order of the Honorable, the above-entitled court, the appellant was heretofore and on or about the 25th day of October, 1921, granted leave to make on this appeal, and that this stipulation may be printed and furnished by the Clerk in the same manner as new testimony under Rule 10 of Rules in Admiralty of the Honorable, the above-

entitled court, and that the same may be considered upon this appeal in the same manner and with the same effect, and in every respect exactly, as if the facts herein stipulated to had been testified to and elicited by deposition pursuant to the order of the above-entitled court made and entered in the above-entitled cause on or about the 25th day of October, 1921, and pursuant to Rule 9 of Rules in Admiralty of the said court.

Dated: November 15, 1921.

PILLSBURY, MADISON & SUTRO,
Proctors for Appellant.
WILLIAM DENMAN,
Proctor for Appellees.

[Endorsed]: No. 3785. United States Circuit Court of Appeals for the Ninth Circuit. Vacuum Oil Co., Proprietary, Ltd., Appellant, vs. H. W. Westphal, et al., Appellees. Stipulation Regarding New Proofs on Appeal. Filed Nov. 22, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

Libelant's Exhibit No. 1.

ORIGINAL.

F. S. 39—S 115

[Stamped:] Henry Kirchmann, Jr., Ship & Freight Broker, San Francisco, Cal.

H. A. SAFFER, Agent,
VACUUM OIL CO., PROPRIETARY, LTD.
No. 61 Broadway,
New York.

Sail
To
Australia

———

New Zealand.

THIS CHARTER PARTY, made in the City of San Francisco, the 19th day of November 1918, Between SANDERS & KIRCHMANN, INC., Agent for Owners of the American Schooner "COMMERCE" of San Francisco, of the burthen of 621 net tons, or thereabouts, register measurement, now enroute to San Francisco with cargo of copra and on completion of discharge is chartered for cargo of Petroleum Products to New Zealand, thence proceeds to Fiji Islands to load cargo of copra for San Francisco, of the first part, and

H. A. SAFFER, Agent of the VACUUM OIL COMPANY PROPRIETARY, LTD., of the second part: WITNESSETH, that the said party of the first part agrees on the freighting and chartering of the whole of the said vessel, (with the exception of

the cabin and necessary room for the crew and storage of provisions, sails, and cables), unto the party of the second part, for a voyage from the port of San Francisco, including Point Orient and Point San Pablo, to Auckland, Wellington, Lyttleton, or Dunedin (one port only at Charterer's option), on the terms following:

1. The said vessel shall be tight, staunch, strong and in every way fitted for such a voyage, including proper dunnage, and shall receive on board for the aforesaid voyage a full cargo of PETROLEUM Products in customary low top cases of ten American gallons each, which the said party of the second part doth engage to provide and furnish; and a full on deck cargo of sawn lumber and/or barrel goods.

2. The said party of the second part agrees to pay to said party of the first part, or Agents, for the use of said vessel during the voyage aforesaid: ($27.50) Twenty-seven Dollars and Fifty Cents per thousand feet B. M. on lumber laden on deck, and ($1.37½) One Dollar Thirty-seven and One-half Cents, United States Gold, on each and every case loaded, whether full part full, or empty.

4. No goods or merchandise, except from the said party of the second part, or his Agents shall be laden on board the vessel without his written consent.

5. The vessel shall haul to such loading berth or berths (where she can lie always afloat, in safety), as may be designated by the Charterer, or his Agents, but, if ordered to haul more than once, the Charterer shall pay all subsequent towage.

6. It is agreed that the lay days for loading shall be (if not sooner despatched) 5,000 cases per weather working day for case oil and 75,000 feet per day for lumber, commencing when the vessel is ready to receive cargo, with one working day additional to clear at the Custom House. Vessel to receive cargo on clearing day, if required by Charterer, or his Agents, free of claim for demurrage. Cargo to be discharged with customary despatch, and to be delivered, at the port or ports of discharge free of vessel's tackles, where she can lie afloat and in safety but at rate of not less than 2500 cases per weather working day for case oil and 75,000 feet per day for lumber. It is understood, if vessel's gear will not handle thus rapidly, that despatch to be as fast as vessel can handle.

7. The lay days for loading are to commence when vessel is ready to load and if the vessel is not ready to load by two o'clock, P. M., on the 130 day after sailing for San Francisco, the Charterer shall have the option of cancelling or maintaining this charter, to be decided when vessel gives notice of readiness to load, if direct from Sydney or a New Zealand port, or the 110th day if direct from South Sea Islands.

8. For each and every day's detention by default of the said Charterer or his Agents, demurrage shall be paid by the Charterer, or his Agents, to the Owners, or their Agents; demurrage being ($200.00) Two Hundred Dollars per day.

9. The cargo to be received and delivered along-

side, at loading berth or berths, within reach of the vessel's tackles where she can lie afloat and in safety.

10. The vessel to be loaded under the usual stowage inspection, if required by the Charterer, free of charge to the vessel for such inspection.

11. The vessel's stevedores for loading and the stevedores for discharging to be appointed by the Master of the vessel.

12. The Master to sign Bills of Lading for the cargo without prejudice to this Charter Party. The Master to call at the Shipper's office to sign Bills of Lading when required.

13. The Charterer's responsibility shall cease when the cargo is all on board and Bills of Lading signed, but the Master and Owners shall have an absolute lien on the cargo for the freight, dead freight or demurrage.

17. General Average, if any, to be adjusted according to York-Antwerp Rules of 1890, and as to matters not therein provided for, according to the usages and customs of the port of San Francisco.

17–A. Charterers have the privilege of shipping Petroleum and/or *it* products in barrels and/or drums (on deck) and odd size cases (under deck) the rate of freight per cubic foot on such cargo to be half of the rate of freight per case expressed in Clause 2.

17–B. All freight shall be prepaid on signing Bills of Lading and shall be considered earned vessel lost or not lost.

17–C. This Charter Party is subject to governmental permission to load and Charterers securing export licenses and is to be cancelled if for any reason loading of the cargo is prevented by act of any government.

17–D. Charterers to pay Ship Broker 2½% on gross amount of this charter.

19. It is also mutually agreed that this Charter Party shall be subject to all the terms and provisions of, and all the exemptions from liability contained in, the Act of Congress of the United States of America, approved on the 13th day of February, 1893, and entitled "An Act relating to navigation of vessels, etc."; and Bills of Lading to be issued in conformity with such Act.

20. A commission of 2½ per cent. upon the gross amount of this Charter is due to Charterer by the vessel and Owners, upon payment of freight under this Charter Party.

21. To the true and faithful performance of all and every of the foregoing agreements, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators and assigns, and also the vessel, freight, tackle and appurtenances, and the merchandise to be laden on board, each to the other, in the penal sum of the estimated freight under the within Charter.

IN WITNESS WHEREOF, we have hereunto set our hands, the day and year first above written.

Signed in presence of—
A. E. WOLFF.
SANDERS & KIRCHMANN, INC.
By H. KIRCHMANN.
VACUUM OIL COMPANY PROP. LTD.
H. A. SAFFER, Agent.

[Endorsed]: United States District Court. No. 16701. San Mateo R. & S. Co. vs. Vacuum Oil Co. etc. Lib. Exhibit No. 1. Filed Apr. 21, 1921. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

No. 3785. United States Circuit Court of Appeals for the Ninth Circuit. Filed Oct. 13, 1921. F. D. Monckton, Clerk.

Libelant's Exhibit No. 2.

FWL–R
Office of the Collector
District No. 28
Address all Communications
for this Office to the Collector
TREASURY DEPARTMENT
United States Custom Service
San Francisco, Cal.
April 20, 1921.

I HEREBY CERTIFY that, according to the records of this office, the following were the sole owners of the Schooner COMMERCE (127464) of this port on November 19, 1918:

"Sanders & Kirchmann (Inc.)" of San Francisco, owning 7/64, together with "Schooner Owners Company" (Inc.) 31/64, Diederick Von der Mehden 2/64, Carl Von der Mehden 2/64, Henry Frische 2/64, C. Nonnenmann 2/64, Louisa Schnabel 1/128, Marie Bette 1/128, Fred H. Klopper 1/64, "Tillman & Bendel" (Inc.) 1/64, Henry Wellmann 2/64, Betty Von Cleve 1/64, Lillie Bruckmann 2/64, Robert Elder 2/64, Chas. F. Lurmann 1/64, Clara Oliver 1/64, "San Mateo Realty and Security Company" (Inc.) 4/64, and Christian Zeuthen of said place and State, 2/64;

that no transfers except as follows have been recorded up to and including Oct. 22, 1919, viz.:

"San Mateo Realty and Security Company" (Inc.) to H. W. Westphal of San Francisco, four sixty-fourths, dated April 18, 1919, and recorded April 29, 1919, at 1:30 P. M. in Book 63 R. V., page 76; and "Tillmann & Bendel" (Inc.) to Thusnelda Wilkens of San Francisco, one sixty-fourth, dated Oct. 21, 1919, and recorded Oct. 22, 1919, at 12 M. in Book 65 R. V., page 17;

and that there is no mortgage or lien on record against said vessel in this office.

Given under my hand and seal of office this 20th day of April, 1921, at 2:30 P. M.

M. LYNCH,
Acting Deputy Collector of Customs.

Fee $1. M. L.

[Stamped]:U. S. Customs Service, San Francisco. Paid April 21, 1921. District 28.

[Stamped]: U. S. Customs Service, San Francisco. 16701. San Mateo R. & S. Co. vs. Vacuum Oil Co. Lib. Exhibit No. 2. Filed Apr. 21, 1921. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

No. 3785. United States Circuit Court of Appeals for the Ninth Circuit. Filed Oct. 13, 1921. F. D. Monckton, Clerk.
F. S. 39—S 115

Libelant's Exhibit No. 14.

C. A. BLUMER Agent,

VACUUM OIL CO., PROPRIETARY, LTD.

San Francisco.

Sail
to
Australia

New Zealand.

THIS CHARTER PARTY, made in the City of San Francisco, the 1st day of November 1919, between SANDERS & KIRCHMANN, INC., Agents for Owners of the American Schooner "COMMERCE" of San Francisco, of the burthen of 621 net tons, or thereabouts, register measurement, now at Point Orient, of the first part, and

C. A. BLUMER, Agent of the VACUUM OIL COMPANY PROPRIETARY, LTD., of the second part: WITNESSETH, that the said party of the first part agrees on the freighting and chartering of

the whole of the said vessel, (with the exception of the cabin and necessary room for the crew and storage of provisions, sails, and cables), unto the party of the second part, for a voyage from the port of San Francisco, including Point Orient and Point San Pablo, to Auckland, Wellington, Lyttleton or Dunedin (one port only at Charterer's option), on the terms following:

1. The said vessel shall be tight, staunch, strong and in every way fitted for such a voyage, including proper dunnage, and shall receive on board for the aforesaid voyage a full cargo of PETROLEUM Products in customary low top cases of ten American gallons each, which the said party of the second part doth engage to provide and furnish; and a full on deck cargo of sawn lumber and/or barrel goods.

2. The said party of the second part agrees to pay to said party of the first part, or Agents, for the use of said vessel during the voyage aforesaid: ($15.00) Fifteen Dollars per thousand feet B. M. on lumber laden on deck, and (70c) Seventy Cents, United States Gold, on each and every case loaded, whether full part full, or empty.

4. No goods or merchandise, except from the said party of the second part, or his Agents shall be laden on board the vessel without his written consent.

5. The vessel shall haul to such loading berth or berths (where she can lie always afloat, in safety), as may be designated by the Charterer, or his Agents, but, if ordered to haul more than once, the Charterer shall pay all subsequent towage.

6. It is agreed that the lay days for loading shall be (if not sooner despatched) 5,000 cases per weather working day for case oil and 75,000 feet per day for lumber, commencing when the vessel is ready to receive cargo, with one working day additional to clear at the Custom House. Vessel to receive cargo on clearing day, if required by Charterer, or his Agents, free of claim for demurrage. Cargo to be discharged with customary despatch, and to be delivered, at the ports of discharge free of vessel's tackles, where she can lie afloat and in safety, but at rate of not less than 2500 cases per weather working day for case oil and 75,000 feet per day for lumber. It is understood, if vessel's gear will not handle thus rapidly, that despatch to be as fast as vessel can handle.

7. The lay days for loading are not to commence before Nov. 3d, 1919, except with the consent of the Charterer, or his Agents, and if the vessel is not ready to load by two o'clock, P. M., on Nov. 30th, 1919, the Charterer shall have the option of cancelling or maintaining this charter, to be decided when vessel is discharged.

8. For each and every day's detention by default of the said Charterer or his Agents, demurrage shall be paid by the Charterer or his Agents, to the Owners, or their Agents, demurrage being ($200.00) Two Hundred Dollars per day.

9. The cargo to be received and delivered alongside, at loading berth or berths, within reach of the vessel's tackles, where she can lie afloat and in safety.

10. The vessel to be loaded under the usual stowage inspection, if required by the Charterer, free of charge to the vessel for such inspection.

11. The vessel's stevedores for loading; and the stevedores for discharging to be appointed by the Master of the vessel.

12. The Master to sign Bills of Lading for the cargo without prejudice to this Charter Party. The Master to call at the Shipper's office to sign Bills of Lading when required.

13. The Charterer's responsibility shall cease when the cargo is all on board and Bills of Lading signed, but the Master and Owners shall have an absolute lien on the cargo for the freight, dead freight or demurrage.

17. General Average, if any, to be adjusted according to York-Antwerp Rules of 1890, and as to matters not therein provided for, according to the usages and customs of the port of San Francisco.

17–A. Charterers have the privilege of shipping Petroleum and/or its products in barrels and/or drums (on deck) and odd size cases (under deck) the rate of freight per cubic foot on such cargo to be half of the rate of freight per case expressed in Clause 2.

17–B. All freight shall be prepaid on signing Bills of Lading and shall be considered earned vessel lost or not lost.

17–C. This Charter Party is subject to governmental permission to load and Charterers securing export licenses and is to be cancelled if for any rea-

son loading of the cargo is prevented by act of any government.

17–D. Charterers to pay Ship Broker 2½% on gross amount of this charter.

19. It is also mutually agreed that this Charter Party shall be subject to all the terms and provisions, of, and all the exemptions from liability contained in, the Act of Congress of the United States of America, approved on the 13th day of February, 1893, and entitled "An Act relating to navigation of vessels, etc."; and Bills of Lading to be issued in conformity with such Act.

20. A commission of 2½ per cent. upon the gross amount of this Charter is due to Charterer by the vessel and Owners, upon payment of freight under this Charter Party.

21. To the true and faithful performance of all and every of the foregoing agreements, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators and assigns, and also the vessel, freight, tackle and appurtenances, and the merchandise to be laden on board, each to the other, in the penal sum of the estimated freight under the within Charter.

IN WITNESS WHEREOF, we have hereunto set our hands, the day and year first above written.

Signed in presence of—

_____.

SANDERS & KIRCHMANN, INC.
By H. KIRCHMANN,
Secretary.
C. A. BLUMER,
Agent for Vacuum Oil Co., Ltd.

[Endorsed]: United States District Court. No. 16701. S. M. R. & S. Co. vs. Vacuum Oil Co. Lib. Exhibit No. 14. Filed April 21, 1921. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

No. 3785. United States Circuit Court of Appeals for the Ninth Circuit. Filed Oct. 13, 1921. F. D. Monckton, Clerk.

Libelant's Exhibit No. 16.

Sept. 16th, 1919.

Mr. C. A. Blumber,
Mills Building,
San Francisco.

Dear Sir:

Enclosed herewith you will find surveyor's report on the Schr. "COMMERCE."

Yours very truly,

SANDERS & KIRCHMANN, INC.

By ————————,

Secretary.

No. ——

BOARD OF MARINE UNDERWRITERS OF SAN FRANCISCO

SURVEYOR'S REPORT.

Flag. Rig. Name—4 mast Schr. "Commerce."
Gross Tons 658.

Master's Name—C. Anderson.

Built in Year 1900 at Alameda, Cal.

Builder's Name—Hay & Wright.

Material—Yellow Fir. Fastening—G. I. F. and treenails.

When Caulked Bottom—Sept/19. Topsides—Sept. 19. Deck—1918.

Present Condition of Caulking—of: Topsides—Good. Deck—Good.

When Docked—Sept/19. Bottom when Painted—Same time.

When Metalled ———. Present Condition of Metal ———.

Owned by Sanders & Kirchmann. Hails from San Francisco.

Anchors—Bowers 2. Stream——— Kedge 1.

Cables—Number 2–1½″. Total Length—180 fathoms.

Present Condition Spars and Rigging—Good. Spare Spars—1.

Pumps—Present Condition—Good. Has gas, steam and hand pumps. Spare Sails—1 suit.

Donkey Engine—Good. Connected with Pumps—Yes.

Classed in———. Register———.

Ballast—Amount, Kind and Draft———.

To Load—Case Oil for Dunedin, N. Z.

GENERAL REMARKS.

Have held survey of this vessel afloat and on drydock and find her to be in good condition throughout. Whilst on drydock bottom and topsides have been caulked and seams around hatch coamings and other minor repairs incident to seaworthiness. Vessel in

every respect fit to carry dry and perishable cargo upon the intended voyage.

Surveyed at Alameda, 15th day of Sept., 1919.

By request of Owners.

CECIL BROWN, Surveyor.

[Endorsed]: United States District Court. No. 16701. S. M. R. & S. Co. vs. Vacuum Oil Co. Lib. Exhibit No. 16. Filed Apr. 22, 1921. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

No. 3785. United States Circuit Court of Appeals for the Ninth Circuit. Filed Oct. 13, 1921. F. D. Monckton, Clerk.

Libelant's Exhibit No. 17.

J. J. MOORE & CO., Inc.
Shipping Merchants
Importers and Exporters
San Francisco
AUSTRALIAN
DISPATCH LINE
UNDER DECK

ON DECK
No Mark
1533 pcs 48,813 ft.

TOTALS
1533 pcs. 48,813 ft.

[Stamped:] Freight Prepaid.

FREIGHT
48,813 ft. at $15.00 per M.

£ $732.20.

SHIPPED in good order and condition, by

J. J. MOORE & CO., Inc.

on board the Am. Schooner called the "COMMERCE" whereof Anderson is Master, now lying at the Port of San Francisco and bound for Dunedin, N. Z., to say:

UNDER DECK
ON DECK (AT OWNER'S RISK)
No Mark

One thousand five hundred thirty-three (1533) pieces Green Rough Clear Redwood said to contain forty-eight thousand eight hundred thirteen (48,813) feet B. M.

(Five (5) pieces in dispute, if on board to be delivered).

[Stamped:] All on board to be delivered.

being marked and numbered as in the margin, and are to be delivered in like order and condition at the Port of Dunedin, N. Z. (the act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, thieves, arrest or restraint of princes, rulers or people, collision, stranding, and other accidents of navigation excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners) unto ORDER ..... or to its or their assigns, they paying freight for the said Lumber, as per margin, with average, if any, as per York-Antwerp Rules, 1890.

IN WITNESS WHEREOF, the Master or Purser of the said vessel hath affirmed to three Bills of Lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in San Francisco, the 22d day of November, 1919.

C. A., Master.

[Stamped across face:] Copy—Non-negotiable.

J. J. MOORE & CO., Inc.
Shipping Merchants
Importers and Exporters
San Francisco
AUSTRALIAN
DISPATCH LINE

UNDER DECK

ON DECK

668 pcs. 221,459 ft.

TOTALS

668 pcs. 221,459 ft.

[Stamped:] Freight Prepaid.

FREIGHT

221,459 ft. at $15.00 per M.

£ $3321.89

SHIPPED in good order and condition, by

J. J. MOORE & CO., Inc.

on board the Am. Schooner called the "COMMERCE" whereof Anderson is Master, now lying at the Port of San Francisco and bound for Dunedin, N. Z., to say:

UNDER DECK

ON DECK (AT OWNER'S RISK)

No Mark

Six hundred sixty-eight (668) pieces Rough Merchantable Douglas Fir lumber said to contain Two hundred twenty-one thousand four hundred fifty-nine (221,459) feet B. M.

[Stamped:] All on board to be delivered.

being marked and numbered as in the margin, and are to be delivered in like order and condition at the Port of Dunedin, N. Z. (the act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, thieves, arrest or restraint of princes, rulers or people, collision, stranding, and other accidents of navigation excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners) unto ORDER ..... or to its or their assigns, they paying freight for the said Lumber as per margin, with average, if any, as per York-Antwerp Rules, 1890.

IN WITNESS WHEREOF, the Master or Purser of the said vessel hath affirmed to three Bills of Lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in San Francisco, the 22d day of November, 1919.

C. A., Master.

[Stamped across face:] Copy—Non-negotiable.

F. S. 62-5000-10-18-S 392

SHIPPED in good order and condition, by Vacuum Oil Co., Pty., Ltd., on board the Am. Schr. called the "COMMERCE," whereof Capt. Anderson is master, now lying at the Port of San Francisco and bound for Dunedin, New Zealand. To say

5000 Cases 2/4s	Kalif Motor Spirit
16574 Cases 2/5s	Laurel
21574	

COPY

NON-NEGOTIABLE

being marked and numbered as in the margin, and are to be delivered in the like order and condition at the port of Dunedin, New Zealand (the dangers of the seas only excepted) unto ORDER NOTIFY—Vacuum Oil Co., Pty., Ltd., or to their assigns he or they paying freight for the said Cases Seventy cents ($.70) per case delivered and all other conditions and exceptions as per Charter Party dated Nov. 1st, 1919, General average, if any, according to York-Antwerp, rules 1890. In witness whereof the master or purser of the said vessel hath affirmed to Four Bills of Lading all of this tenor

ALL CLAIMS FOR SHORT DELIVERY TO BE PAID AT DISCHARGING PORT BEFORE VESSEL SAILS.

FREIGHT PREPAID

21574 cases at .70¢ each	$15101.80
Less 2½% Comm: Due Charterer	377.55
	$14724.25

and date, one of which being accomplished, the others to stand void.

It is Mutually Agreed, that this shipment is subject to all terms and provisions of and to all the exemptions from liability contained in the Act of Congress of the United States relating to Navigation &c., approved on the 13th day of February, 1893.

Dated in San Francisco, the 15th day of November, 1919.

All Conditions and Exceptions of Charter Party are to be Considered as Embodied in This Bill of Lading.

Gauge and Contents, Quality and Value unknown and not accountable for leakage, or rust. Freight payable in Cash without discount on each and every Case delivered, full, part-full or empty.

C. A., Master.

[Endorsed]: United States District Court. No. 16701. S. M. R. & S. Co. vs. Vacuum Oil Co. Lib. Exhibit No. 17. Filed Apr. 22, 1921. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

No. 3785. United States Circuit Court of Appeals for the Ninth Circuit. Filed Oct. 13, 1921. F. D. Monckton, Clerk.

Libelant's Exhibit No. 18.

MEMORANDUM FOR ASSISTANCE OF THE COURT.

DIFFERENCE BETWEEN FREIGHT UNDER CHARTER-PARTY DATED NOV. 19, 1918, AND CHARTER-PARTY DATED NOVEMBER 1, 1919:

To freight earned if Schooner "COMMERCE" loaded under Charter-party dated Nov. 19th, 1918:		
21,574 cs. oil @ $1.37½ per case	$29,664.25	
270,272 ft. lumber @ $27.50 per M	7,432.48	
	$37,096.73	
Less charter commission 2½%	927.42	$36,169.31
To freight on Case Oil cargo shipped per Schr. "COMMERCE" Charter-party dated Nov. 1, 1919:		
21,574 cs. oil @ 70¢ per case	$15,101.80	
To Freight on 270,272 ft. lumber @ $15.00	4,054.09	
	$19,155.89	
Less charter commission 2½%	478.90	$18,676.99
NET DIFFERENCE IN FREIGHT DUE OWNERS		$17,492.32

[Endorsed]: United States District Court. No. 16701. S. M. R. & S. Co. vs. Vacuum Oil Co. Lib. Exhibit No. 18. Filed Apr. 22, 1921. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

No. 3785. United States Circuit Court of Appeals for the Ninth Circuit. Filed Oct. 13, 1921. F. D. Monckton, Clerk.

Libelant's Exhibit No. 19.

CHARTERS MADE BETWEEN VACUUM OIL CO. AND SANDERS & KIRCHMANN, INC.

Schooner	"EXPANSION"	Charter-party	dated	San	Francisco,	Jan. 30, 1918.
"	"COMMERCE"	"	"	"	"	Oct. 14, 1918.
"	"LUZON"	"	"	"	"	Sept. 3, 1918.
"	"SAMAR"	"	"	"	"	Nov. 2, 1918.
"	"	"	"	"	"	" 19, 1918.
"	"FORESTER"	"	"	"	"	" 19, 1918.
"	"	"	"	"	"	" 13, 1918.
"	"PHILIPPINE"	"	"	"	"	" 19, 1918.
"	"	"	"	"	"	" 13, 1918.
"	"COMMERCE (Cancelled)	"	"	"	"	" 19, 1918.
"	"	"	"	"	"	" 1, 1919.
"	"LUZON"	"	"	"	"	" 19, 1918.

[Endorsed]: United States District Court. No. 16701. S. M. R. & S. Co. vs. Vacuum Oil Co Lib. Exhibit No. 19. Filed Apr. 22, 1921. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

No. 3785. United States Circuit Court of Appeals for the Ninth Circuit. Filed Oct. 13, 1921. F. D. Monckton, Clerk.

No. 3786

United States Circuit Court of Appeals

for the Ninth Circuit

JOHN E. GILCHRIST,
Appellant,

vs.

F. B. MALLORY COMPANY,
a Corporation,
Appellee.

VOLUME NO. 1

(Containing All of Record Except Exhibits)

Transcript of Record

Upon Appeal from the United States District Court
for the District of Oregon

No. .

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Upon Appeal from the United States District Court
for the District of Oregon

CHARLES E. TOWNSEND,
Crocker Building, San Francisco,
California, and

GRIFFITH, LEITER & ALLEN,
Electric Building, Portland, Ore.,
For the Appellants

LOYAL H. McCARTHY,
Northwestern Bank Building,
Portland, Ore.,
For the Appellee

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TESTIMONY ON BEHALF OF COMPLAINANT:

TESTIMONY ON BEHALF OF DEFENDANT:

In the District Court of the United States

FOR THE DISTRICT OF OREGON.

March Term, 1919.

BE IT REMEMBERED, That on the 29th day of May, 1919, there was duly filed in the District Court of the United States for the District of Oregon, the following

BILL OF COMPLAINT

To the Honorable, the Judges of the District Court of the United States in and for the District of Oregon:

John E. Gilchrist, a citizen of the United States, residing at South Bend, in the County of Pacific and State of Washington, brings this his Bill of Complaint against F. B. Mallory Company, a corporation, having its principal place of business at Portland, in the County of Multnomah, and State of Oregon, and a resident thereof.

And thereupon your orator complains and says:

I.

That he, the said John E. Gilchrist, before and at the time of the applications for letters patent hereinafter mentioned, was a citizen of the United

States, and was the true, original, and first inventor of certain new and useful Improvements in Pulley Blocks described therein, not known or used by others in the United States before his invention or discovery thereof, and not patented or described in any printed publication in the United States or any foreign country before his invention or discovery thereof, nor more than two years prior to his hereinafter referred to applications for Letters Patent therefor, and not in public use or on sale in the United States for more than two years prior to his said applications for Letters Patent therefor; nor first patented or caused to be patented by him or his legal representatives or assigns, in any country foreign to the United States on an application filed therefor prior to the filing of his said applications for Letters Patent of the United States.

II.

And your orator further shows unto your Honors, that he, the said John E. Gilchrist, so being a citizen of the United States and as your orator is informed and believes and avers, the inventor of said Improvements in Pulley Blocks, made in writing two several applications for Letters Patent therefor, to the Commissioner of Patents of the United States, in accordance with the then existing Acts of Congress, and having duly complied, in all respects, with the conditions and requirements of said Acts, such proceedings were had that, on the sixth day of December, 1910, Letters Patent of the United States No.

977,613, and on the third day of June, 1913, Letters Patent of the United States No. 1,063,528, both in due form of law, for said inventions, were issued under the seal of the Patent Office of the United States, signed by the Secretary of the Interior, or under his direction, and countersigned by the Commissioner of Patents, and delivered to the aforesaid John E. Gilchrist, whereby there was secured to him and to his heirs, assigns, or other legal representatives, for the term of seventeen years from and after the 6th day of December, 1910, and from and after the 3d day of June, 1913, respectively, the full and exclusive right of making, using and vending to others to use, said inventions or discoveries throughout the United States and the Territories thereof, as by said Letters Patent, or duly certified copies thereof, ready in Court to be produced, will more fully and at large appear.

III.

Your orator further shows that the respective subject matters of, and inventions described and claimed in, said several Letters Patent, to wit, No. 977,613 and No. 1,063,528, are adapted for, and are susceptible of conjoint use, and that they are so used.

IV.

And your orator further shows unto your Honors that by virtue of the premises he became, and now is, the sole and exclusive owner of said letters patent, and the inventions and improvements described

therein, and of all the rights and privileges granted and secured thereby. And that since he became the owner thereof, as aforesaid, he has invested and expended large sums of money, and he has been to great trouble in and about said inventions, for the purpose of carrying on the business of manufacturing and selling Pulley Blocks containing the said inventions, and making the same profitable to himself and useful to the public; and that said inventions have been and are of great benefit and advantage; and that a large number of such pulley blocks were made according to said inventions, and sold by your orator to great advantage to the public; and your orator believes he will realize and receive large gains and profits therefrom if infringements by said defendant and his confederate shall be prevented.

V.

Yet the defendant, well knowing the premises and the rights secured to your orator, as aforesaid, but contriving to injure your orator, and deprive him of the benefits and advantages which might and otherwise would accrue unto him from said inventions, after the issuing of said letters patent, as aforesaid, and before the commencement of this suit, did, as your orator is informed and believes, and therefore alleges, without the license or allowance, and against the will of your orator, and in violation of his rights, and in infringements of the aforesaid Letters Patent, at Portland, in the County of Multnomah and

State of Oregon, within the jurisdiction of this Honorable Court, and elsewhere in the said District, unlawfully and wrongfully, and in defiance of the rights of your orator, make, construct, use and vend to others to be used, the said inventions, and did make, construct, use and vend to others to be used Pulley Blocks made according to, and employing and containing said inventions, and that it still continues so to do; and that it is threatening to make the aforesaid Pulley Blocks in large quantities, and to supply the market therewith, and to sell the same.

All in defiance of the rights acquired and secured to your orator as aforesaid, and to his great and irreparable loss and injury, and by which he has been and still is being deprived of great gains and profits, which he might and otherwise would have obtained, and which have been received and enjoyed, and are being received and enjoyed, by the said defendant through its aforesaid wrongful acts and doings, and that your orator has been occasioned large damages because of such wrongful acts of the defendant.

VI.

And your orator further shows unto your Honors, on information and belief, that the said defendant has sold large quantities of said Pulley Blocks, and has a large quantity on hand, which it is offering for sale, and has made and realized large profits and advantages therefrom; but to what extent, and how much exactly, your orator does not know, and prays

a discovery thereof. And your orator says that the use of said inventions by said defendant, and his preparation for and avowed determination to continue the same, and his other aforesaid unlawful acts, in disregard and defiance of the rights of your orator, have the effect to and do encourage and induce others to venture to infringe said patents in disregard of your orator's rights.

VII.

And your orator further shows unto your Honors that he has caused notice to be given to said defendant of said infringements, and of the rights of your orator in the premises, and requested it to desist and refrain therefrom; but it disregarded said notices, and refused to desist from said infringements, and still continues to make and sell patented Pulley Blocks.

VIII.

And your orator states on information and belief to this Honorable Court that the Pulley Blocks made, used and vended to others to be used by the said defendant are in all material respects the same as those described in said letters patent No. 977,613, and are an infringement of claims one (1), four (4) and five (5) thereof; and are in all material respects the same as those described in said letters patent No. 1,063,528 and are an infringement of claims one (1) and two (2) thereof.

IX.

And your orator prays your Honors to grant your orator a preliminary, and also a perpetual, writ of injunction, issuing out of and under the seal of this Honorable Court, directed against the said F. B. Mallory Company, and strictly enjoining it and its officers, directors, agents and employees not to make, use, or vend to others to be used the said improved Pulley Blocks covered and secured by said Letters Patent, or either of them.

And your orator further prays that the said defendant by the decree of this Court, may be compelled to account and pay over to your orator all profits which said defendant has derived, or shall have derived from the construction, or sale, or use in any manner of said patented pulley blocks, or any part thereof, obtained, claimed and secured to your orator by said Letters Patent, or either of them; and also, that your Honors, upon the entering of the decree for infringement, as above prayed for, may proceed to assess, or cause to be assessed under your direction, in addition to the profits to be accounted for by the defendant as aforesaid, the damages your orator has sustained by reason of such infringement, and that your Honors may increase the actual damages so assessed to a sum equal to three times the amount of such assessment, under the circumstances of the wilful and unjust infringement by said defendant, as herein set forth; and that the defendant be decreed also to pay the costs of this suit, and

that your orator may have such other and further relief as the equity of the case may require, and to this Court may seem just.

To the end therefore that the defendant may, if it can, show why your orator should not have the relief prayed, and may full, true, direct and perfect answer make to all the premises, and to all the several matters hereinbefore stated and charged, as fully and particularly as if separately interrogated as to each and every of said matters, and may be compelled to account for and pay over to your orator the profits by it acquired, and the damages suffered by your orator from the aforesaid acts.

May it please your Honors to grant unto your orator the writ of Subpoena ad Respondendum issuing out of and under the seal of this Honorable Court, directed to said defendant, commanding it to appear and make answer to this Bill of Complaint and to conform and abide by such order and decree herein as to this Court may seem meet.

And your orator will ever pray.

JOHN E. GILCHRIST, (Sgd.)

JAS. H. CARY,
Solicitor.

GRIFFITH, LEITER & ALLEN,
Of Counsel.

State of Oregon,
County of Multnomah. } ss.

On this 15th day of May, 1919, before me personally appeared John E. Gilchrist, and made oath that he is the complainant herein, that he has read the foregoing bill subscribed by him, and knows the contents thereof and that the same is true of his own knowledge, except as to matters which are therein stated to be based on information and belief and as to those matters he believes it to be true.

W. L. Foley (Sgd.),
Notary Public for Oregon.

My commission expires July 24, 1919.
(Notarial Seal.)

And afterwards, on the 25th day of May, 1920, there was filed in said Court the following

AMENDED ANSWER

To the Honorable Judges of the United States District Court for the District of Oregon:

Now comes the above named defendant and for an amended answer to the bill of complaint filed by the complainant herein, admits, denies and alleges as follows:

I.

Admits that the said John E. Gilchrist is a citizen of the United States and was such citizen at all times mentioned in the bill of complaint;

Denies that he is the first, or true, or original in-

ventor of any new or useful improvements referred to in paragraph numbered "I" or claimed in United States Letters Patent No. 977,613 or United States Letters Patent No. 1,063,528;

Denies that the improvements claimed by said letters patent were not known and used by others in the United States for more than two years prior to complainant's application for either of said letters patent;

Denies that the same was not described in any printed publication for more than two years prior to complainant's application for either of said letters patent;

Denies that the same was not in public use and on sale in the United States for more than two years prior to complainant's application for Letters Patent as to each and both of said Letters Patent;

Denies that the said alleged improvements were not patented for more than two years prior to complainant's application for Letters Patent.

II.

As to paragraph numbered "II" admits that complainant made two applications to the Commissioner of Patents of the United States for Letters Patent upon what were therein claimed to be improvements in pulley blocks and that thereafter on December 6th, 1910, Letters Patent No. 977,613 were issued to him and that thereafter on June 3d, 1913, Letters Patent No. 1,063,528 were issued to him; but denies

that the said John E. Gilchrist is the inventor of said alleged improvements;

Denies that the said John E. Gilchrist complied with the conditions and requirements of the then existing Acts of Congress, and denies that due proceedings were had upon said applications;

Denies that said Letters Patent secured to the complainant any exclusive right to make, or use, or vend any article or improvement of any nature whatsoever.

III.

As to paragraph numbered "III," denies that the alleged improvements claimed by Letters Patent No. 977,613 and No. 1,063,528 have any adaptability or susceptibility for conjoint use.

IV.

As to paragraph numbered "IV," denies that complainant is the sole or exclusive owner of the inventions or improvements claimed or described in either of said Letters Patent;

Denies that any rights or privileges of any nature whatsoever are secured to him by either of said Letters Patent;

As to all other allegations in said paragraph contained, defendant denies that he has any knowledge or information thereof sufficient to form a belief and upon the ground denies the same.

V.

As to paragraph numbered "V," denies that defendant contrived to injure the complainant or to deprive him of any advantages or benefits secured to him by said letters patent or otherwise;

Denies that he wrongfully or unlawfully or in defiance of the rights of complainant either made, used, constructed or sold any pulley blocks which in any way infringed any rights of the complainant secured to him either by said Letters Patent or otherwise;

Denies that he has threatened to do any act whatsoever in defiance of the rights of complainant;

Denies that complainant is being injured or deprived of any gains or profits by any wrongful act of the defendant, or that complainant suffered any damage by any wrongful act of defendant.

VI.

Admits that defendant has sold large quantities of pulley blocks and is still selling pulley blocks, but denies that any of the said pulley blocks so sold or to be sold infringe upon any right secured to the complainant;

Denies the defendant has used any invention or improvement secured to complainant and thereby encouraged or induced others to infringe upon complainant's rights.

VIII

As to paragraph numbered "VII," denies that complainant caused notice to be served upon or to

be given to this defendant of any claimed infringement until just prior to the commencement of this suit, and denies that complainant requested this defendant to desist from making or selling pulley blocks of any nature whatsoever until just prior to the commencement of this suit although complainant had known for years the exact styles and models of pulley blocks carried by defendant and had known for years that defendant was making and selling the very pulley blocks which complainant now claims to be an infringement upon his rights.

VIII.

Denies that defendant is making, using or vending pulley blocks which in any way infringe upon any rights secured by United States Letters Patent No. 977,613 or No. 1,063,528.

IX.

Denies that complainant has any right to an injunction or restraining order against this defendant as to any matter whatsoever.

* * * * * * * *

As a first further and separate answer and defense to complainant's bill of complaint defendant alleges:

I.

That all of the essential features, principles and elements of the alleged improvement or discovery of the said John E. Gilchrist and of either of his alleged improvements and discoveries were disclosed and described prior to the alleged discovery or invention of the said John E. Gilchrist, and more than

two years prior to his application for Letters Patent in publications and patents issued both in this country and in foreign countries, many of which are unknown to the defendant herein and which he asks leave to insert and refer to upon discovery thereof.

II.

That some of the patents and publications so disclosing and describing the alleged improvements and discoveries of the complainant are as follows: United States Letters Patent No. 8,950 issued to C. H. Platt, May 18th, 1852; United States Letters Patent No. 115,248 issued to Henry Smith, May 23d, 1871; United States Letters Patent No. 189,773 issued to J. W. Norcross, April 17th, 1877; United States Letters Patent No. 241,703, issued to J. W. Norcross, May 17th, 1881; United States Letters Patent No. 304,103 issued to J. B. F. Herreshoff, August 26th, 1884; United States Letters Patent No. 390,341 issued to A. E. Brown, October 2d, 1888; United States Letters Patent No. 492,550 issued to T. R. Ferrall, February 28th, 1893; United States Letters Patent No. 513,067 issued to J. R. Labadie, January 16th, 1894; United States Letters Patent No. 610,-172 issued to I. M. Dotson, September 6, 1898; United States Letters Patent No. 644,729 issued to W. W. Bouse, March 6th, 1900; United States Letters Patent No. 699,518 issued to E. B. Hammond, May 6, 1902; United States Letters Patent No. 760,378 issued to A. N. and C. B. Borquist, May 17, 1904; United States Letters Patent No. 760,944 issued to

G. Agobian May 24, 1904; United States Letters Patent No. 765,475 issued to J. E. Gilchrist, July 19, 1904; United States Letters Patent No. 769,998 issued to A. D. Foote September 13, 1904; United States Letters Patent No. 779,437, issued to G. Nettle, January 10, 1905; United States Letters Patent No. 780,280 issued to Herbert Gilley, January 17, 1905; United States Letters Patent No. 786,790 issued to G. W. King, H. J. Barnhart and C. B. King, April 4, 1905; United States Letters Patent No. 806,-562 issued to Andrew Opsal December 5, 1905; United States Letters Patent No. 823,231 issued to A. B. Tarbox, June 12, 1906; United States Letters Patent No. 844,159 issued to Enoch Ludford, February 12, 1907; United States Letters Patent No. 845,041 issued to Andrew Opsal, February 19, 1907; United States Letters Patent No. 847,955 issued to J. N. Lindsay, March 19, 1907; United States Letters Patent No. 869,422, issued to William H. Corbett, October 29, 1907; United States Letters Patent No. 876,-176 issued to Bennett W. Hammond, January 7, 1908; United States Letters Patent No. 880,805 issued to James Mattson, March 3, 1908; United States Letters Patent No. 898,121 issued to H. J. Littler, September 8, 1908; United States Letters Patent No. 942,274 issued to E. Martin, December 7, 1909; United States Letters Patent No. 964,284 issued to J. A. Lockfaw, July 12, 1910; United States Letters Patent No. 973,177 issued to S. J. and P. W. Davis and C. McCready, October 18, 1910; United States Letters Patent No. 984,141 issued to J. T. Johnson, February 14, 1911; British

Letters Patent No. 712-1893 issued to David John Morgan and William Guy Nixon, complete specifications accepted January 12, 1894; British Letters Patent No. 5657 issued to Jens Christian Wurtzen Kjelgaard, complete specifications accepted April 18, 1896; British Letters Patent No. 4127-1901 issued to Thomas Reed Dyne; advertisement of Pacific Iron Works published on page 46 of the January, 1906, issue of "The Timberman"; advertisement of Borquist Block on page 49 of same publication; advertisement of Vulcan Iron Works on page 59 of same publication; advertisement of Columbia Steel Company on page 18 of "The Timberman" in October, 1907, issue; advertisement of Vulcan Iron Works on page 45 of the December, 1907, issue of "The Timberman"; F. B. Mallory advertisement on page 25 of the January, 1908, issue of "The Timberman"; Columbia Steel Company advertisement on page 18 of the January, 1908, issue of "The Timberman"; Portland Tool Works advertisement on page 29 of the January, 1908, issue of "The Timberman"; Borquist Block advertisement, page 59 of the January, 1908, issue of "The Timberman"; Pacific Iron Works advertisement on page 88 of the January, 1908, issue of "The Timberman"; Columbia Steel Company advertisement, page 18 of the February, 1908, issue of "The Timberman"; Borquist advertisement, page 38 of the February, 1908, issue of "The Timberman"; Vulcan Iron Works, page 53 of the February, 1908, issue of "The Timberman"; Portland Iron Works, page 66 of the February,

1908, issue of "The Timberman"; Pacific Iron Works advertisement, page 78 of the February, 1908, issue of "The Timberman"; F. B. Mallory advertisement, back cover of February, 1908, issue of "The Timberman"; Columbia Steel Company advertisement, page 18 of the February, 1909, issue of "The Timberman"; F. B. Mallory advertisement, page 23 of the February, 1909, issue of "The Timberman"; Vulcan Iron Works advertisement, page 26 of the February, 1909, issue of "The Timberman"; Pacific Iron Works advertisement, page 74 of the February, 1909, issue of "The Timberman"; F. B. Mallory advertisement, page 43 of the February, 1911, issue of "The Timberman"; F. B. Mallory advertisement, page 18 of the June, 1912, issue of "The Timberman"; F. B. Mallory advertisement, page 20 of the July, 1912, issue of "The Timberman."

* * * * * * * *

And for a second further and separate answer and defense to the bill of complaint filed herein said defendant alleges:

I.

That the alleged and so-called inventions and improvements in Pulley Blocks described and embodied in the letters patent in said complaint referred to do not involve or contain any patentable novelty, invention or discovery, nor cover nor disclose any new art, machine, manufacture or composition of matter, nor any new or useful improvement there-

of, and the said alleged inventions involve and comprehend only obvious, well known and prior mechanical expedients or the adjustment of familiar devices and appliances.

And for a third further and separate answer and defense to said bill of complaint, defendant alleges:

I.

That defendant is informed and believes and therefore avers that neither the alleged improvements in pulley blocks which the patents mentioned in the complaint purport to cover, nor any of the elements or features thereof, were invented by the said John E. Gilchrist, but that the said alleged improvements and all the essential parts and features thereof were in common use by various persons and well known to the public generally for more than two years prior to the application for either of said patents by the said John E. Gilchrist, and for many years prior thereto and for many years prior to the alleged invention or discovery of any of the said alleged improvements by the said John E. Gilchrist.

II.

That all of the said alleged improvements in pulley blocks were used in the logging camps of the Pacific Northwest, and defendant is informed and believes and therefore avers that said alleged improvements were used in the logging camps in and around Grays Harbor, Washington, in the vicinity of complainant's residence and other Pacific North-

west logging camps, and that it was the use of such alleged improvements in the logging camps that prompted complainant to make application for Letters Patent and thereby attempt to appropriate to himself the control of the same.

III.

That defendant is informed and believes and therefore avers that all of the features, principles and elements of the alleged improvements or discoveries of the said John E. Gilchrist were manufactured and used by various persons unknown to defendant long prior to complainant's alleged invention or discovery thereof and were in public use and on sale in the United States for more than two years prior to his application for patent, and defendant asks the privilege of inserting the names of such persons upon discovery thereof, some of said persons being as follows: F. B. Mallory Company of Portland, Oregon, who has known, used, sold and had manufactured for it blocks embodying the said features beginning with the year 1902 and continuing to the present date, A. N. and C. B. Borquist of Portland, Oregon, who have known, used and manufactured and sold blocks embodying the said features since the year 1902, and prior to the year 1902, Polson Logging Company, a corporation of Hoquiam, Washington, who has manufactured and used blocks embodying said features since 1902; James J. Geary of Clatskanie, Oregon, who has known of and used blocks embodying all of said features since 1902.

* * * * * * * *

And for a fourth further and separate answer and defense to the bill of complaint filed herein defendant alleges:

I.

That each of the alleged improvements or inventions claimed by Letters Patent No. 977,613 and 1,063,528 describes and claims a mere aggregation of old principles which produce no new result, and said Letters Patent are void for want of novelty.

* * * * * * * * *

And for a fifth further and separate answer and defense to the bill of complaint filed herein defendant alleges:

I.

That defendant and other pulley block manufacturers have for many years and with the knowledge of the complainant been making, advertising and selling pulley blocks which complainant now claims are an infringement of his alleged patents without complainant making any objection thereto.

II.

That in the year 1914, defendant learned through a third person that the complainant had made the statement that he thought defendant was infringing upon his patents and that he was going to let the matter run along until it would make it worth while and he would then bring suit against defendant.

III.

That upon obtaining this information defendant immediately made an investigation for the purpose of finding out whether or not any of its pulleys were in any way infringing upon any of the rights of the complainant and went to the trouble and expense of furnishing Munn & Co., patent attorneys of Washington, D. C., and New York City, with blue prints of the line of pulley blocks manufactured by defendant and procured a search to be made by said attorneys for the purpose of determining whether or not the defendant was infringing upon the rights of any persons and especially the complainant, and and upon receiving an opinion from said attorneys, wrote to the complainant herein in November, 1914, stating what defendant had heard concerning complainant's claim that defendant was infringing upon his rights and also stating that defendant had procured a search and legal opinion as to its right to manufacture the line of pulley blocks it was making, stated further that defendant did not wish to infringe upon the rights of complainant and invited complainant to examine the opinion and copies of patents resulting from such search, the numbers, names and dates of which patents were furnished to plaintiff, and requested complainant to confer with defendant so as to avoid any controversy or trouble between them at a later date.

IV.

That complainant has at all times been in position to have conferred with defendant upon said matter and thereby arrive at a just understanding and agreement as to the rights of the respective parties to this suit, and has at all times been financially able to prosecute any proceeding for the protection of his alleged rights, but the complainant, knowing that defendant and other pulley block dealers were building up a demand for the line of pulleys which complainant now claims are an infringement upon his rights and for the express purpose of building up a large claim for damages and taking advantage of the efforts of defendant and others, made no demand and no attempt to enforce his alleged rights under said patents until the month of February, 1919, when he notified defendant that it was infringing upon complainant's patents and demanded that defendant discontinue the making and selling of the line of pulley blocks which said complainant now claims is an infringement of his patents, but which complainant has known for many years and as defendant believes and therefore avers complainant has known for more than six years were being so made and sold by this defendant and by others.

V.

That by reason of complainant not heretofore demanding that defendant and others should discontinue the making and selling of such pulley blocks, and by reason of his standing by and allowing de-

fendant and others to build up a demand for the line of blocks which complainant now claims are an infringement of his patents, and by reason of all of the other acts of the complainant in the premises, which have prompted a large number of pulley block manufacturers, including this defendant, to feel that the complainant was making no claim against them and would make no claim against them for any alleged infringement of his patents, the complainant has waived any rights which he might have had to claim an infringement and should now be estopped from claiming that defendant has infringed his patents and should be estopped from claiming any damages or asking for an accounting by reason of any infringement or alleged infringement of his patents.

Wherefore, defendant prays that the bill of complainant herein be dismissed, that defendant recover its costs incurred herein, and have such other relief as the Court may deem just and equitable.

LOYAL H. MCCARTHY (Sgd.),
Attorney and Solicitor for Defendant.

State of Oregon,
County of Multnomah. } ss.

On this 24th day of May, 1920, before me personally appeared M. A. Kelliher, who made oath that she is treasurer of the defendant company herein and is authorized to verify the foregoing amended answer on its behalf; that she has read the foregoing

amended answer and knows the contents thereof and that the same is true of her own knowledge, except as to matters which are therein stated to be based on information and belief and as to those matters she believes it to be true.

M. A. Kelliher (Sgd).

Subscribed and sworn to before me this 24th day of May, 1920.

Bonnie M. Sims (Sgd.),
(Notarial Seal) Notary Public for Oregon.

My commission expires February 2, 1921.

And afterwards, on the fourteenth day of February, 1921, there was filed in said Court the following

OPINION

Portland, Oregon, February 14, 1921, 10 a. m.

R. S. Bean, District Judge:

I have carefully examined and considered the record and elaborate briefs submitted by counsel, but the time at my disposal will not permit a discussion of the various questions argued, nor do I deem it necessary.

Under the proof the ultimate question for determination as far as complainant's patent 977,613 is concerned is whether the element of a pulley side cast in one piece and provided with an interior oil chamber is sufficient, in view of the prior art, to constitute invention and give validity to the patent. All other elements of the claims in question are old in the art, and in the Gilchrist pulley they do not per-

form any new function or have any new mode of operation, or produce any new result, and therefore the combination of them in one device is not invention.

> "The combination to be patentable must produce a different force or effect or result in the combined forces or processes, from that given by their separate parts. There must be a new result produced by their union; if not so, it is only an aggregation of separate elements."
>
> *Beckendorfer vs. Faber,* 92 U. S. 347.

See also

Hailes vs. Van Wormer, 20 Wall. 353.

Palmer vs. Corning, 156 U. S. 342.

Thatcher Heating Co. vs. Burtis, 121 U. S. 286.

Jackson Skirt & N. Co. vs. Rosenbaum, 225 Fed. 531.

Oil reservoirs in pulley sides are old in the art as shown by the Morgan, Ludbord and Labadie patents. Indeed the Morgan patent reads substantially letter perfect with claim 1 of complainant's patent. It is true the oil reservoir in the Morgan pulley is formed by a plate riveted on the side and not cast as an integral part of it as in complainant's device. It, however, is for the same purpose, operates and functions in the same way and produces the same result by retaining oil and lubricating the bearing pin as in complainant's patent, and it was not invention for complainant to make the side in one piece thus combining the separate parts of the Morgan patent,

since there is no substantial change in function, operation or result.

Ft. Pitt Supply Co. vs. Ireland & Mathews Mfg., 232 Fed. 871.

Enterprise Mfg. vs Shakespeare Co., 220 Fed. 304.

Crier vs. Innes, 160 Fed. 102.

Huebner-Toledo Breweries vs. Mathews Grav. Car. Co., 253 Fed. 435.

Machine Co. vs. Murphy, 97 U. S. 120.

R. R. Supply Co. vs. Elyria I. & S., 244 U. S. 285.

In reaching this conclusion, I am not unmindful of the presumption of the validity of the patent arising from its issue, or that the auto-lubricating block manufactured by plaintiff has proven its superior utility in the logging business.

> "But a mere carrying forward or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means with better results is not such invention as will sustain a patent."
>
> *Smith vs. Nichols,* 88 U. S. 119.

And

> "The advantages claimed for it (the Gilchrist device) and which it no doubt possesses to a considerable degree cannot be held to change this result, it being well settled that utility cannot control the language of the statute, which limits the benefit of the patent law to things which are new as well as useful. The fact that the patented article has gone into general use is evidence of its utility, but not con-

clusive of that, and still less of its patentable novelty.

Grant vs. Walters, 148 U. S. 556.

See also

McClain vs. Ortmayer, 141 U. S. 419.
Hollister vs. Benedict & Burnham Mfg., 143 U. S. 59.
Smith vs. Nichols, 21 Wall. 112.
Edwards vs. Dayton Mfg. Co., 257 Fed. 980.
Herzog vs. Keller Co., 234 Fed. 85.
Huebner Toledo Breweries vs. Mathews Gravity Carrier Co., supra.
Klein vs. Seattle, 77 Fed. 220.

The question whether a patent involves invention is one of fact for the Court, to be answered in the light of all the pertinent considerations including the prior art, and so viewing the complainant's patent I am of the opinion that it is invalid for want of invention.

The other patent in controversy calls for a guard used conjointly with complainant's prior patent, arranged between the pulley cheek plates and between the shackle and the sheave, and in my judgment is not infringed by defendant using a connecting member between the compression links or spanners of the prior Littler patent.

It follows that the complaint should be dismissed and it is so ordered.

And afterwards, on the seventeenth day of February, 1921, there was filed in said Court the following

JUDGMENT AND DECREE

This cause came on to be further heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:

I.

That claims 1, 4 and 5 of United States Letters Patent No. 977,613, issued to John E. Gilchrist, December 6, 1910, are made up of elements old in the art, which perform no new function, disclose no new mode of operation and produce no new result and are invalid for lack of patentable novelty.

II.

That defendant's use of a guard manufactured in conformity to a design disclosed by United States Letters Patent No. 45,911, issued to F. B. Mallory June 9, 1914, and which consists in the use of a connecting member between the compression links or spanners described and claimed in United States Letters Patent No. 898,121, issued to H. J. Littler September 8, 1908, under which defendant also operates, does not infringe claims 1 and 2 of United States Letters Patent No. 1,063,528.

III.

That complainant's bill of complaint herein be dismissed and that F. B. Mallory Company do have

and recover of the complainant, John E. Gilchrist, its costs and disbursements incurred herein, hereinafter to be taxed.

Dated this 17th day of February, 1921.

R. S. Bean,
District Judge.

And afterwards, on the tenth day of August, 1921, there was filed in said Court the following

PETITION FOR ORDER ALLOWING APPEAL

To the Honorable Court Above Entitled:

The above-named complainant, John E. Gilchrist, conceiving himself aggrieved by the decree filed and entered on the 17th day of February, 1921, in the above entitled cause, does hereby appeal therefrom to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, for the reasons and upon the grounds specified in the Assignments of Error, which is filed herewith, and prays that this appeal may be allowed, that a citation issue as provided by law, and that a transcript of the record, proceedings, exhibits and papers, upon which said decree was made and entered as aforesaid, duly authenticated, may be sent to the Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco.

And your petitioner further prays that an order be made fixing the amount of security, if any, which the complainant, John E. Gilchrist, shall give and

furnish upon such appeal, and that upon giving such security all further proceedings in this Court be suspended and stayed until the determination of said appeal by said United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 9th day of August, 1921.

GRIFFITH, LEITER & ALLEN,
Solicitors for Complainant.

Due, timely and legal service admitted by copy at Portland, Oregon, this 9th day of August, 1921.

LOYAL H. MCCARTHY,
Attorney for Defendant.

And afterwards, on the tenth day of August, 1921, there was filed in said Court the following

ORDER ALLOWING APPEAL

The petition of the complainant for an appeal is allowed; and upon the petitioner filing a bond in the sum of One Thousand ($1000.00) Dollars with sufficient sureties, to be conditioned as required by law, shall operate to suspend and stay all further proceedings in this Court, except the preparation and settlement of the record on appeal, until the determination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 10th day of August, 1921.

R. S. BEAN, *Judge.*

Due, timely and legal service by copy admitted at Portland, Oregon, this 10th day of August, 1921.

LOYAL H. MCCARTHY,
Attorney for Defendant.

And afterwards, on the tenth day of August, 1921, there was filed in said Court the following:

ASSIGNMENT OF ERRORS

Now comes the complainant in the above entitled cause and files the following assignment of errors upon which he will rely upon his prosecution of the appeal in the above entitled cause, from the decree made by this Honorable Court on the 17th day of February, 1921:

I.

That the District Court of the United States for the District of Oregon erred in holding that Claims 1, 4 and 5 of United States Letters Patent No. 977,-613, issued to John E. Gilchrist, December 6, 1910, are respectively made up of elements old in the art which perform no new function, disclose no new mode of operation and produce no new result.

II.

That the District Court of the United States for the District of Oregon erred in holding that Claims 1, 4 and 5 of United States Letters Patent No. 977,-613, issued to John E. Gilchrist, December 6, 1910, are respectively invalid for lack of patentable novelty.

III.

That the District Court of the United States for the District of Oregon erred in holding that the novelty of Claims 1, 4 and 5, respectively, of said United

States Letters Patent No. 977,613, resides in any individual element rather than in a combination.

IV.

That the District Court of the United States for the District of Oregon erred in holding that Claims 1, 4 and 5 of said United States Letters Patent No. 977,613, respectively, involve merely an aggregation of old devices and that each of said claims fails to disclose a combination.

V.

That the District Court of the United States for the District of Oregon erred in holding that Claims 1, 4 and 5 of said United States Letters Patent No. 977,613, are each invalid for want of invention.

VI.

That the District Court of the United States for the District of Oregon erred in holding that the several elements described in Claims 1, 4 and 5 of United States Letters Patent No. 977,613, functioning in co-operation as a logging block of superior utility, do not, as to each claim, produce any new result.

VII.

That the District Court of the United States for the District of Oregon erred in holding that defendant's manufacture and use of a line guard, as disclosed by the evidence, did not infringe Claims 1 and 2 of United States Letters Patent No. 1,063,528.

VIII.

That the District Court of the United States for the District of Oregon erred in holding that the manufacture and use by the defendant of a line guard consisting of the addition of a connecting member between the compression links or spanners described and claimed in United States Letters Patent No. 898,121, issued to H. J. Littler September 8, 1908, does not infringe Claims 1 and 2 of United States Letters Patent No. 1,063,528.

IX.

That the District Court of the United States for the District of Oregon erred in dismissing the complaint herein and rendering judgment for costs in favor of the defendant.

Wherefore, the complainant prays that said decree be reversed and that said District Court for the District of Oregon be ordered to enter a decree reversing the decision of the lower court in said cause.

GRIFFITH, LEITER & ALLEN,
Attorneys for Complainant.

Due, timely and legal service by copy admitted at Portland, Oregon, this 9th day of August, 1921.

LOYAL H. MCCARTHY,
Attorney for Defendant.

And afterwards, on the tenth day of August, 1921, there was filed in the said Court the following

ORDER ALLOWING WITHDRAWAL OF ORIGINAL EXHIBITS

On motion of Griffith, Leiter & Allen, solicitors for John E. Gilchrist, complainant, and good cause appearing therefor, it is by the Court now ordered:

That all the exhibits in the above entitled case, both complainant's exhibits and defendant's exhibits, including logging blocks, parts of logging blocks, models, drawings, copies of patents, catalogues and advertisements, which are impracticable to have copied or duplicated, be, and they are hereby allowed to be withdrawn from the files of this Court in said case and transmitted by the clerk of this Court to the United States Circuit Court of Appeals for the Ninth Circuit as a part of the record upon appeal for the complainant herein to the said Circuit Court of Appeals; said original exhibits to be returned to the files of this Court upon the determination of said appeal by said Circuit Court of Appeals.

Dated this tenth day of August, 1921.

R. S. Bean, *Judge.*

Due, timely and legal service by copy admitted at Portland, Oregon, this tenth day of August, 1921.

Loyal H. McCarthy,
Attorney for Defendant.

And afterwards on the fifteenth day of August, 1921, there was filed in the said Court the following

BOND ON APPEAL

Know All Men by These Presents, that we, John E. Gilchrist, as principal, and Fidelity & Deposit Company of Maryland, as surety, are held and firmly bound unto F. B. Mallory Company, a corporation, defendant, in the sum of One Thousand ($1000.00) Dollars lawful money of the United States, to be paid to it, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, our heirs, executors, administrators, successors or assigns, by these presents.

Whereas, the above named John E. Gilchrist, as complainant, has prosecuted his appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit.

Now, therefore, the condition of this obligation is such that if the above named John E. Gilchrist shall prosecute his said appeal to effect and answer all costs if he fail to make good his plea, and satisfy the judgment appealed from, then this obligation shall be void; otherwise to remain in full force and effect.

Sealed with our seals and dated this 13th day of August, 1921.

JOHN E. GILCHRIST (Seal),
(Seal) *Principal.*
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By E. G. McINTOSH,
Attorney in Fact (Seal),
Surety.

APPROVAL

The above and foregoing bond is approved this 15th day of August, 1921.

R. S. BEAN, *Judge.*

Due, timely and legal service by copy admitted at Portland, Oregon, this fifteenth day of August, 1921.

LOYAL H. McCARTHY,
Attorney for Defendant.

And afterwards, on the fifteenth day of August, 1921, there was filed in said Court the following

CITATION ON APPEAL

To F. B. Mallory Company and Loyal H. McCarthy, Its Attorney,

Greeting:

Whereas, John E. Gilchrist, complainant, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for

the District of Oregon, in your favor, and has given the security required by law;

You are, therefore, hereby cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 15th day of August, in the year of our Lord one thousand nine hundred and twenty-one.

R. S. Bean, *Judge.*

Due, timely and legal service by copy admitted at Portland, Oregon, this fifteenth day of August, 1921.

Loyal H. McCarthy,
Attorney for Defendant.

And afterwards, on the nineteenth day of August, 1921, there was filed in the said Court the following

PRAECIPE FOR TRANSCRIPT ON APPEAL

To the Clerk of the United States District Court:

Please incorporate the following papers, documents and exhibits in the transcript of record on appeal in the above entitled cause:

1. Bill of Complaint as amended by stipulated interlineation.
2. Amended Answer.
3. Condensed Record on Appeal.

4. Conclusions of the Court dated February 14, 1921.
5. Final Decree filed February 17, 1921.
6. Petition for Order Allowing Appeal.
7. Order allowing Appeal.
8. Bond on Appeal.
9. Order allowing Withdrawal of Original Exhibits.
10. Assignment of Errors.
11. Citation.
12. Order of Praecipe.
13. All Letters Patent introduced on Final Hearing.
14. Any Orders extending time of filing Transcript of Record.

Dated August 15, 1921.

GRIFFITH, LEITER & ALLEN,
Solicitors for Complainant.

Due, timely and legal service by copy admitted at Portland, Oregon, this nineteenth day of August, 1921.

LOYAL H. MCCARTHY,
Attorney for Defendant.

And afterwards on the eighth day of September, 1921, there was filed in the said Court the following

ORDER OF EXTENSION OF TIME

Upon motion of the complainant and appellant and for good cause shown, it is hereby ordered that the time for filing the transcript of record and the record on appeal herein in the United States Circuit Court of Appeals for the Ninth Circuit be extended to and including the first day of October, 1921.

Dated at Portland, Oregon, this 8th day of September, 1921.

R. S. Bean, *Judge.*

Due, timely and legal service by copy admitted at Portland, Oregon, this eighth day of September, 1921.

Loyal H. McCarthy,
Attorney for Defendant.

And afterwards, on the 14th day of September, 1921, there was filed in said Court the following

CONDENSED RECORD OF PROCEEDING ON FINAL HEARING UNDER EQUITY RULE 75

The trial commenced Tuesday, June 1, 1920, and concluded Monday, June 7, 1920.

Opening statements of counsel for the parties omitted.

Stipulated that printed sales copies of patents may

be introduced in evidence by either party without certification.

Complaint introduced in evidence certified copy of letters patent to John E. Gilchrist No. 977,613, dated December 6, 1910, and the same was marked "Complainant's Exhibit No. 1."

Complainant introduced in evidence a certified copy of letters patent to John E. Gilchrist No. 1,063,528, dated June 3, 1913, and the same was received and marked "Complainant's Exhibit No. 2."

Complainant introduced in evidence a comparative drawing of the Gilchrist block and the Mallory block, and the same was received and marked "Complainant's Exhibit No. 3."

> Mr. McCarthy: "With the explanation that this is merely as shown in the patent, not as claimed, that we are admitting, and that we deny the cross-head is as shown in the lower right-hand corner."

Defendant admits that F. B. Mallory Company is a corporation and a resident of the District of Oregon.

It is stipulated that the complainant is the owner under his letters patent, set forth in the complaint, of whatever rights he may have secured through the issuance to him of said patents.

TESTIMONY OF LEWIS E. YOUNIE, called as a witness for the complainant:

Age, 43 years; residence, Tacoma, Washington; occupation, mechanical engineer at present employed

as chief engineer by Puget Sound Iron & Steel Works, which is the largest shop and manufacturing plant in Tacoma, Washington. The duties of his position are designing logging and hoisting machinery; has been with Puget Sound Iron & Steel Works since December, 1919; before that was employed as chief engineer by the Pacific Marine Iron Works of Portland, Oregon, as chief engineer with the duties of designing machinery manufactured by the employers; was with Pacific Marine Iron Works for two years and prior to that time was employed for six years by Willamette Iron & Steel Works of Portland, Oregon, as mechanical engineer with the duty of designing logging machinery and accessories; designed the line of logging blocks manufactured by Willamette Iron & Steel Works, being employed by them from 1910 to 1916; prior to 1910 employed by Puget Sound Iron & Steel Works, Tacoma, Washington, as machinist, for seven years; attended Iowa State College of Ames, Iowa, taking a course in mechanical engineering; for past twenty years has had actual experience in the Pacific Northwest in the designing and handling of logging blocks, logging equipment, accessories, etc., and during that time has been in the woods to inspect the operation of the logging machinery which he is designing. Has been familiar with the logging block industry of the Pacific Northwest since 1900, seeing the blocks manufactured and seeing them used; has assembled such

logging blocks; is familiar with every part of them, and is familiar with the Mallory block.

Witness temporarily withdrawn.

TESTIMONY OF G. C. HUMKE, called as a witness on behalf of Complainant:

Witness stated that he is 25 years of age; a resident of the City of Portland, Oregon; present occupation with Paulson Machine Works; in 1918 for 8 months worked for the defendant company in Portland, Oregon, as production man, having charge of handling the parts of the Mallory line of blocks; that he was familiar with the assembling of the Mallory blocks and knew the line of blocks that Mallory handled in 1918; general catalogue of F. B. Mallory Company issued in 1917 was introduced and received in evidence and marked "Complainant's Exhibit No.4."

The Mallory logging block was introduced and received in evidence and marked "Complainant's Exhibit No. 5," the defendant admitting that the exhibit was its logging block.

Witness stated that during 1918 there were on sale by the defendant types of block the same as Complainant's Exhibit No. 5, dissimilar only in dimensions, shown in defendant's catalogue Exhibit No. 4, as No. 19, page 37; No. 17, page 39; No. 21, page 41; No. 29, page 43; No. 21, page 45; No. 40, page 47; No. 139, page 50; No. 22, page 57; Nos. 66 and 67, page 64; Nos. 266 and 267, page 65; Nos. 42, 43 and 44, page 70; Nos. 50, 51 and 52, page 73; that all of the numbers given above were the same as Complainant's Exhibit No. 5, except for

changed dimensions of sheave, pin and side and were on sale in 1918 by the defendant. A logging block marked "Mallory Sky Line Block No. 49" was introduced and received in evidence and marked "Complainant's Exhibit No. 6." This was admitted by the defendant to be its logging block.

Witness referred to defendant's catalogue, Exhibit No. 4, and stated that in 1918 the defendant had on sale types of block similar to Complainant's Exhibit No. 6, and dissimilar only in point of dimensions, in the following catalogue numbers: Nos. 45, 46, 47, 48 and 49, shown on page 68; Nos. 150, 151 and 152, shown on page 72; that Nos. 150, 151 and 152 were only made on special order; that all of the blocks identified by the witness by number in the catalogues were on sale on the floor of defendant's store room in 1918.

UPON CROSS EXAMINATION:

Witness' attention called to figure 23, page 40 of defendant's catalogue and he stated that this block was carried by the defendant while he was in its employ; that the block last referred to has a grease cup in place of an oiling side; that the elbow is supposed to be used for grease; that grease blocks are made with a plug that screws in to press the grease.

"Q. The elbow blocks are not made that way, are they?

"A. This elbow block here has a pipe plug in it.

You can screw it part way down. Maybe you can use oil in that.

"Q. Soft oil?

"A. I think you can, yes.

"Q. Well, do you know whether they did use soft oil in those or not?

"A. No, sir, I don't.

"Q. You don't know?

"A. In fact, I don't recall 23 ever being made with elbow oil-cup while I was there."

Witness LEWIS E. YOUNIE resumed stand and direct examination continued:

Witness examined Gilchrist block marked "Willapa Harbor Iron Works," compared it with patent No. 977,613, and stated that it conforms to the specifications and drawings of said patent. Whereupon, said block introduced and received in evidence as Complainant's Exhibit No. 7.

Witness examined Gilchrist block marked "Gilchrist-South Bend," and stated that it conforms to the specifications and drawings of Patent No. 1,063,-528. Whereupon, said block was introduced and received in evidence, and marked "Complainant's Exhibit 8."

Witness analyzed Patent No. 977,613 and stated from the specifications and drawings of said patent the parts which go to make up the same. Witness stated that the function of the cross-head No. 8 is three-fold—supports the block, keeps the sides in

their correct relative position and keeps the line in its proper place.

Witness stated that drawing of the Mallory block on Exhibit No. 3 is an accurate representation of the structure as evidenced by Exhibit No. 6, except as to the upper part of the drawing with reference to the cross-head.

Witness stated that the operation of the Mallory block is identical with the operation of the Gilchrist block, except that the Mallory block has an oil chamber in each side and, therefore, the pin has two openings for the passage of oil from each of the oil chambers to the sheave; that the operation of the two blocks is identical.

Witness then referred to Patent No. 1,063,528, analyzed the same and described the operation and function of the several elements thereof. Witness stated that element 12, the Mallory guard, as shown on Exhibit No. 3, differs from the guard in the Gilchrist Patent No. 1,063,528 in that the Mallory guard has four ears, while the Gilchrist guard only has two ears, and that there is also a difference in the width of that part of the guard which lies longitudinally between the sides of the block, the Gilchrist part being wider than the Mallory part; that both guards perform the same function and that such function is to hold the side pieces in their relative positions, to prevent the strain on the block in drawing the sides together, thus cramping the sheave and retarding its rotation; that such guards

co-operate with every other element of the block in that if the sheave were retarded or stopped, the block would not perform its work; that if the shackle shown on Exhibit 6 is made large, strong and stiff enough it performs the functions of the line guard; that the shackle has the function of supporting the block and keeping the sides in their relative positions, and that such function is important for if the sides pulled together, then the sheave would bind and stop rotating.

Witness further compared the Mallory and Gilchrist sheaves and showed wherein they were identical, each having a long extended hub reaching out into the annular recesses; that the function of the long bearing was to increase the bearing surface and reduce the bearing pressure, the amount of pressure per square inch; that logging blocks are subject to terrific strains and loads and if the bearing is narrow, the pressure is so great as to squeeze out the bushings. That the annular recesses of the sides function to provide for the extended length of the pin and the increased area of bearing surface and to accommodate the long hub; also such recesses function to make the block a little less accessible to dirt and foreign matter, and dirt would tend to roughen the surface of the pin, wearing the same out more rapidly than if the bearing were kept clean.

Witness compared the Mallory pin with the Gilchrist pin and stated that the function of each is

identical in that each holds the sides of the block in proper position by having the sides rigidly secured against the shoulders of the pin; that the Mallory pin differs from the Gilchrist pin only as to the number of openings for the admission of oil from the oil chambers; that their functions are absolutely the same.

UPON CROSS EXAMINATION:

Witness stated that the swivel is the mechanical equivalent of the goose neck for the purpose of carrying the load of the block; that the "H" guard shown on Complainant's Exhibit No. 5 is the mechanical equivalent of the "Z" guard shown on Complainant's Exhibit No. 8; that if the connecting bar in the "H" guard were removed it would have the function or purpose of the guard in that it would make it more flimsy and one would fail to get combined strength of the two side pieces of the guard; that it would be just a question of the degree of strength, and if the side pieces of the "H" guard would be heavy enough without the connecting member, then they would hold the sides in their relative position; that there is a stress and strain on the connecting member of the "H" guard, although the main tension is longitudinally of the sides of the guard; that the purpose for which the guard is placed in the block is to take what would be the longitudinal strain on the side links of the guard. The fact that there are four ears on the "H" guard

would not have a tendency to strengthen the sides of the guard against a racking back and forth; that the "H" guard with four lugs is a little stronger than the "Z" guard with two lugs; that the only way in which the "Z" shaped bar can overcome tension is by the fact that it is snugly fitted between the sides by a solid piece.

The witness stated that he had taken into consideration the prior art in his analysis of the Gilchrist patent; that a long hub is necessarily referred to in Claim 4 of Patent No. 977,613 at line 114 of page 2 of the specifications and claims; that Claim 4 discloses a long hub where it provides that "parallel sides having annular recesses in their adjacent faces" and goes on later to say that the pin extends into those recesses; that as soon as the annular recess is introduced, it would make for a longer hub no matter whether the recesses were one-thirty-second of an inch deep or an inch deep; witness' attention was called to the language of the claim, "a sheave journaled for rotation upon the pin and having oppositely disposed bosses adapted to fit closely but anti-frictionally in the recesses," and stated that the purpose of the extension of the hub into the recesses is not to form a dust-proof bearing, but is for the purpose of forming a long bearing; after an examination of the hub of the Gilchrist block and of the Mallory block the witness stated that the hub of the Mallory block does not extend into the recesses at right angles to the shell but that the end

of the hub is on an angle of about sixty degrees; that the Mallory sheave is not intended to fit closely in the annular recess, and that no hub is supposed to fit closely in that place; that the close fitting of the Gilchrist claim is important in preventing of dirt from working into the bearings; that the "Z" shaped guard would not be as practicable if the center piece did not fit snugly between the sides; although it would be considered practical and would perform all of its functions; that said "Z" guard will not perform the function of preventing the crowding in of the sides to the extent that it will if the cross bar is closely fitted between the sides; that the "Z" shaped guard, of the same material and thickness, by reason of the two right angles in its construction, would not be as strong as a single span going directly from one side to the other; that the cross-head performs the function of the guard and shackle and one cannot use both the guard and cross-head on the same block for they occupy the same space; that the specifications of the Gilchrist patent called for a double lug on the top of each side and a single lug on each side of the shells. The witness was shown wash drawing of "top view of Gilchrist's top as described in patent No. 977,613, and stated that the same is a correct representation of parts 6, 7 and 8; drawing then introduced and received in evidence, marked Defendant's Exhibit "A"; witness testified that top portion on Defendant's Exhibit "A," denominated "No. 8," including the central portion and each of the lugs No. 7, would form a letter "H."

"Q. The only function that the top 8 has, outside of supporting the block itself, is to act as a guard to keep the rope down to the sheave, from getting up into the tackle, and also as a spacer between the sides, to keep the sides from crowding in?

"A. Yes; and also to provide the other part of the swivel, allowing this block to turn around."

UPON RE-DIRECT EXAMINATION:

Witness stated that cross-head has the additional function over the "H" guard, of effectively supporting the block in the woods; that if the connecting bar is removed from the guard "H" it will leave the two sides so that they would act independently with a racking motion, and the effect of retaining the bar is to make the guard rigid by tying the two links together; that with four ears, as in the "H" guard, one can make part 12 narrower than in the "Z" guard "because you would depend on the fits of the parts, on the pins getting their contact, instead of getting contact between the two sides, against this part No. 12 in this construction"; that the "H" form of guard functions in the same way as the "Z" form of guard and the "H" form of guard with a narrow part 12 is the same as the "Z" form of guard with the wide part 12; that the drawings of the Gilchrist patent show that the hub is much longer than the width of the sheave, the ends of the hub entering into the annular recesses.

"Q. Will you turn to page 2 of that patent 977,-613, and read from line 10 to line 15?

"A. The sheave 20 is adapted to be journaled for rotation upon the bearing pin 24; and this sheave 20 is provided upon its outer faces with bosses 21, adapted to fit closely, yet anti-frictionally, in the recesses 17 of the sides 1 and 2. The shoulders 26 upon the pin 24, prevent the sides 1 and 2 from bearing against the sheave 20.

"Q. Does that describe a long hub?

"A. Yes, sir."

(*Transcript of Testimony, pages* 47 *to* 48.)

That the principal object of the long hub is to increase the bearing area of the pin to reduce the bearing pressure per square inch and incidentally to make the bearing less accessible to dirt and grit; that the bevel of the ends of the Mallory hub results in the hub not fitting as closely into the recesses and consequently not keeping out the dirt as effectively as does the Gilchrist hub; that the main feature of the extension of the hubs into the recesses is to increase the bearing area.

UPON RE-CROSS EXAMINATION:

Witness stated that the stress on the "H" type of guard comes entirely upon the pins; that the purpose of snugly fitting the piece of the "Z" shaped guard between the sides is to take up the compression strain.

"Q. That is true. I misspoke that. I mean the compression, the stress of compression, would be entirely upon the pins in one case, and upon the piece of metal fitting snugly between the cheeks in the other?

"A. I gave you a qualified answer to that before, I think. If the contact was on the sides of this piece or part No. 12 before the contact between the holes in the ears, then that would be true; but if the pins bent forward of the holes and took the load at the same time, then it would be simultaneous.

"Q. When the block was brand new, possibly; but with the slightest wear, there would be greater wear on the pins than on the sides of this piece of metal in between?

"A. I don't know as there would ever be any wear on that point.

"Q. No wear at all. But there would be wear on the pin, would there not?

"A. Not necessarily; not necessarily from the load.

"Q. That is the object of the member fitting snugly between the cheeks, that the compression will come on the metal and not on the pins, is it not?

"A. I don't know whether that was the object or not. That is the fact of the case.

"Q. That is the function that piece performs?

"A. Yes.

"Q. And there is no such function performed by the letter "H," is there?

"A. No, he gets his load directly from the pins.

"Q. From the pins only?

"A. Yes.

"Q. In other words, the letter "H" gets its load in exactly the same way as two independent bars would get it fastened directly across from one pin to the other, does it not?

"A. Yes; if the pins fitted in all four holes at the same time, yes.

"Q. The compression would all be through the means of the pins? Is that not true?

"A. Yes, it would be through the means of the pins, in any event."

(*Transcript of Testimony, pages* 50 *and* 51.)

UPON RE-DIRECT EXAMINATION:

That machine fitted pins are never used in logging blocks; considering the result to be obtained, the "H" form of guard is equivalent to the "Z" form and performs the same function and by substantially the same means.

UPON RE-CROSS EXAMINATION:

"Q. And if the supporting member between the sides were removed, would it still be the equivalent?

"A. Yes, to the same extent.

* * * * * * * * *

"Mr. Cary: That concludes our prima facie case, with the exception of this statement I would like to

have in the record. I have reference to the fact that we have asked in our prayer for an accounting.

"Court: Very well. The matter will rest until the question of the infringement has been determined."

(*Transcript of Testimony, pages* 52 *and* 53.)

Complainant rests.

TESTIMONY OF ROBERT GILLESPIE, called as a witness on behalf of the defendant:

Witness stated that he lived in Seattle, Washington; that he recalled a conversation with the complainant concerning his logging blocks, during the year 1914.

"Q. Will you kindly state the substance of that conversation?

"A. I was in South Bend along towards October or November, 1914, and called on Mr. Gilchrist on business. When there we talked of blocks, and he asked me if we would take his agency in Seattle. I said we couldn't do it, on account of the fact that we were agents for Mallory. He said Mallory had no right to sell these blocks on account of the fact that he had a patent, and I asked had he taken the matter up with Mallory. He said, 'No.' And I said, 'Why not?' He said he was waiting until Mallory got enough of them out to make it worth while."

(*Transcript of Testimony, page* 54.)

UPON CROSS EXAMINATION:

Witness stated that he told Mr. Mallory the substance of his conversation with the complainant about ten days afterwards; that at that time the witness was selling the defendant's line of blocks and has represented the defendant in the sale of said line of blocks since that time; that the witness has been handling the oil reservoir blocks of the defendant which are in suit; that witness never handled the Gilchrist blocks; that witness communicated the conversation with complainant to Mr. Mallory in person and not by letter.

"Q. Now, at that time you were interested with Mr. Mallory in a business way?

"A. No. We were selling his blocks.

"Q. Didn't Mr. Mallory have an interest in the corporation with which you were identified at that time?

"A. No.

"Q. No interest at all?

"A. No, sir.

"Q. And he hasn't today?

"A. No, sir.

"Q. And you have no financial interest between you and Mr. Mallory?

"A. No, sir.

"Q. Has the F. B. Mallory corporation any interest in your concern?

"A. No.

"Q. Have any of the interest in which Mr. Mallory is interested an interest in your concern?

"A. No.

"Q. Who are the stockholders of your institution?

"A. Myself.

"Q. Yourself?

"A. Yes.

"Q. And you tell me that Mr. Mallory has never had any interest in your outfit?

"A. No, sir.

"Q. The only reason you told him this matter was because you were agent for his blocks?

"A. Exactly."

(*Transcript of Testimony, pages* 55-56.)

TESTIMONY OF F. B. MALLORY, called as a witness on behalf of the defendant:

Witness stated that he was president and manager of the defendant company, which is engaged in the business of selling logging equipment, wire rope and logging supplies, including the handling and manufacturing of logging blocks; that witness has been engaged in this line of business since 1902, and for himself since 1907, handling logging blocks since 1902; that logging blocks with long hubs have been handled since 1905 or 1906, his own experience dating back to 1907; the defendant introduced in evidence its catalogue No. 1, of 1907, and the same was received and marked "Defendant's Exhibit B." That the said catalogue was distributed among the

trade at the date of its issuance and that defendant carried and sold all the blocks illustrated in said catalogue.

Witness identified Geary Block on page 6, the dirt-proof Columbia Yarding Block on page 5, the Return Line Head Blocks on page 9, and the Columbia or Skookum Trip-line Blocks on page 8, and the Return Line Head Blocks of the Columbia Engineering Works on page 10 of said catalogue, as being blocks having a long bearing and hub. Witness' attention called to page 7 of said catalogue, wherein is shown a logging block with an elbow device, and stated he carried that block, the construction of which he explained as "a block made with an elbow screwed on the end of the pin, for the purpose of holding oil, which was fed the bearing through a hole drilled in the end of the pin, lengthwise of the pin with a hole cross-drilled so that the oil was conveyed to the bearing sheave."

Defendant introduced Mallory Block Diamond "M" No. 10, and the same was received and marked Defendant's Exhibit "C"; witness stated that he had manufactured a similar block since 1907 and was handling them as far back as 1902; that a pattern of Defendant's Exhibit "C" was made in 1911, but construction was used before that; soft oil was used in Defendant's Exhibit "C" prior, but also grease in some instances; that the purpose of putting the elbow on Defendant's Exhibit "C" was to hold oil to feed by gravity into the bearing; that the next

development in oil chambers was to fit on a reservoir holding a larger amount of oil, which is indicated by Mallory Block Diamond "M" No. 10, introduced in evidence by defendant, and received and marked "Defendant's Exhibit D." That Defendant's Exhibit "D" had been manufactured off and on since 1907 and the purpose of the extension on the elbow was to furnish greater oil capacity to act as an oil reservoir.

Defendant presented the block shell and pin of a Bouse Yarding Block and the same was marked for identification as "Defendant's Exhibit E." Witness has handled block with pins of the type of Defendant's Exhibit "E" since prior to 1905, and since that date pins have been provided with shoulders.

Defendant introduced an advertisement of The Timberman of January, 1906, and the same was received and marked "Defendant's Exhibit F."

It was stipulated that The Timberman is a technical magazine of general circulation in the Northwest.

Witness stated that he is familiar with the Bouse Blocks shown as Defendant's Exhibit "F"; witness was also shown page 46 of January, 1906, and he stated that the line of blocks shown were manufactured by the Pacific Iron Works of Astoria, and that he sold some of them in 1906; that the pin was made by a hole drilled in the end, cross-drilled to the surface, and an oil cup screwed to the end of the pin, which contained oil, the oil being fed through the

hole in the end of the pin and to the bearing; that said pins were shouldered so that the nuts screwed up against the shoulder kept the sides from binding together and cramping the sheave. Said page 46 was introduced and received in evidence and marked Defendant's Exhibit "G."

Defendant also offered in evidence advertisement shown on page 49 of the January, 1916, Timberman and the same was received and marked "Defendant's Exhibit H." Witness stated that he is familiar with the construction of the block indicated in the last advertisement and he described the construction as follows:

"A. The pin was fitted with an oil reservoir that screwed on its end, the oil being fed to the bearing through a hole that was vertically drilled and then cross-drilled to the sheave bushing, and the pin on one side, on the front end, was made with a shoulder, so that the nut would screw up against that shoulder and keep the side in position."

Defendant introduced advertisement on page 18 of the October Timberman of 1907, and the same was received and marked "Defendant's Exhibit I." Witness stated that he is familiar with block advertised in Defendant's Exhibit "I" and explained the construction thereof as follows:

"A. This is a block that was made at that time by the Columbia Engineering Works. The pin screwed into both sides, both ends of the pin being fitted with a shoulder. The pin was drilled hollow and then

cross-drilled, and a plug fitted in the end, and that hollow recess was filled with grease. There was a sheave with extended hub or long bearing, that was mounted on this pin, and the ends of the bearing or the hubs of the sheave were received in an annular recess on each side. It was called at that time the 'Dirt Proof Block.'

"Q. Did those hubs fit closely in the annular recesses of the sides?

"A. They did."

Defendant introduced advertisement on page 25 of The Timberman of January, 1908, and the same was received and marked "Defendant's Exhibit J."

Witness described the block shown on last exhibit as follows:

"That is a block that was made with two sides, made of plate steel, and sheave mounted on a pin. The pin was made with a nut on the back or end side, that was screwed up against the shoulder to keep the back shell in place, and on front end of the pin there was an oil cup attached, that fed oil or grease through a hole drilled vertically through the pin to the center, and then cross-drilled to the bearing. That also had a shoulder on the front end of the pin."

Witness stated that all of these blocks have parallel sides, a sheave and a sheave journaled to rotate upon an axial pin; that it is the common form of construction since 1904 or 1905 to have shells with annular recesses in the sides, also from the same time to have a long bearing pin and a long hub; that

since 1902 it was a common form of construction to provide logging blocks with oil chambers, that all logging blocks have a top of some kind holding the sides together at the top. The defendant introduced page 29 of January, 1908, of The Timberman and the same was received in evidence and marked "Defendant's Exhibit K."

Witness described the blocks shown in last exhibit as follows:

"It was a block composed of two sides, a pin, and a sheave mounted on this pin. The pin was provided with a nut on the back part that screwed up against a shoulder, to keep the back shell in position, and the front end was fitted with an oil reservoir that contained oil, which was fed to the sheave bearing through a hole drilled in the end of the pin and cross-drilled to the bushing or bearing; also provided with a shoulder on the front end, so that the side was kept in place."

Defendant introduced an advertisement of the Vulcan Iron Works on page 45 of The Timberman of 1907 and the same was received in evidence and marked "Defendant's Exhibit L." Concerning the block shown in the last exhibit witness said:

"That block was made with cast steel sides, between which a sheave was mounted on a pin. The back end of the pin screwed into the back shell, was threaded into the back shell and screwed up against the shoulder, and the front end of the pin was drilled and then, vertically drilled to about the center and

then cross-drilled, so that the lubricant or oil could feed to the bearing, and the hole in the front end of the pin was filled with a plug, to keep out dirt and keep the oil in. Then the front shell screwed on the end of the pin, up against the shoulder."

Defendant offered in evidence an advertisement of the Skookum block, page 18 of the January, 1908, Timberman and the same was received in evidence and marked "Defendant's Exhibit M." Concerning the block shown in the last exhibit witness said:

"It is a block that was made by the Columbia Engineering Works, had two cast steel sides, between which a sheave was mounted on a pin or axle. One end of the pin was fitted with a nut that screwed up against a shoulder, and the other, the front end, was furnished with a similar nut, and the pin itself was drilled hollow for the purpose of containing oil, furnishing an interior oil chamber, you might say, and a plug was attached to the end of the pin, to keep the lubricant in and the dirt out.

"This block was also furnished with an annular recess in both sides, similar to that previously described.

"This recess was furnished with a cap, that fitted over the end of the pin. It fitted very closely.

"With the idea to keep out the dirt and grit.

"The hub of the sheave was extended on both sides, furnishing a long bearing, and fitting into the recesses in the sides."

Defendant introduced an advertisement of the Vulcan Iron Works on page 53 of the February, 1908, Timberman, and the same was received in evidence and marked "Defendant's Exhibit N." Witness stated that the construction of the block disclosed by Exhibit "N" is the same as that of Exhibit "E."

Defendant introduced an advertisement on page 38 of the February, 1908, Timberman, and the same was received in evidence and marked "Defendant's Exhibit O." Concerning the block shown in this advertisement, witness said:

"This is an advertisement and description of a block that was made by C. B. Borquist—Head Trip Line Block. It was made with two plate steel sides, an annular recess being provided in the sides by an offset in the strap. There was a sheave with extended hub that was mounted on a pin, and that pin was furnished with a straight oil cup or reservoir on the front end, the same as previously described."

(*Transcript of Testimony, page* 70.)

Defendant introduced an advertisement of the Portland Tool Works on page 66 of the February, 1908, Timberman, and the same was received in evidence and marked "Defendant's Exhibit P."

Defendant introduced its advertisement on the back cover of the February, 1908, Timberman, and the same was received in evidence and marked "Defendant's Exhibit Q." Witness described this block

as having a drill pin and with sides screwing up against shoulders on the pin."

Defendant introduced an advertisement of the Pacific Iron Works on page 78 of the February, 1908, Timberman, and the same was received in evidence and marked "Defendant's Exhibit R."

Defendant introduced photographic reproduction of page 43 of The Timberman of February, 1911, and the same was received in evidence and marked "Defendant's Exhibit S."

Referring to the cross piece between the shackle and the sheave shown on Exhibit "S" witness stated:

"This has two projections that are cast integral with each side, and meet in the center forming a cross-head or cable guard across the lugs below the shackle.

Mr. McCarthy: I offer that in evidence.

Marked "Defendant's Exhibit S."

Mr. Cary: You testify there is a crosspiece there?

"A. No, sir.

Mr. Cary: Just two straps."

Witness stated that all blocks concerning which he has testified were manufactured and sold at the time of advertisement, and that he has personally handled all these blocks, except the block of the Pacific Tool Works; that these blocks have been continuously on the market since the time of their introduction, except as discontinued.

Witness testified that he had the following correspondence with the plaintiff:

"235-237 Pine Street,
Portland, Oregon,
November twelfth, 1914.

Mr. J. E. Gilchrist,
South Bend, Washington.

Dear Sir:—

While in Seattle recently, Mr. Gillespie of the Mill & Mine Supply Co., called the writer's attention to out pattern of auto-lubricating sky line blocks and stated that in the course of a recent conversation with you you had complained to him of this pattern of ours conflicting with a patent which you have on a logging block with oil reservoir in one side.

As it is not our intention to at any time conflict with another's rights in such matters, we have taken the matter up with a firm of Patent Attorneys at Washington, D. C., sending them cut and full description of our block and asking them to thoroughly search the patent records and inform us if our pattern conflicted in any way with others recorded. We have received their written opinion on this subject citing eight patents on similar blocks issued prior to your patent of December 6th, 1910, the oldest of these being a British patent of January 12th, 1893, and they state in their written opinion, in view of the fact that the prior art is pointed out in these eight other patents it would appear to clearly anticipate all the claims of the Gilchrist patent, and it is their opinion that we are not conflicting in any way, shape or form.

Since receiving this opinion from them, we have referred the subject to our own attorney here at Portland, and his opinion is in accordance with that received from Washington.

Will be very glad to show you the written opinion that we have received on this subject together with copies of prior patents, as it is not our desire to impose upon any rights that you may have, and believe that we can convince you beyond a doubt that we are within our rights in manufacturing a block with an oil reservoir in each side.

Yours truly,

F. B. Mallory Company.

F. B. Mallory, Pres."

* * * * * * * *

"November 16th, 1914.

F. B. Mallory Co.
Portland, Ore.
Gentlemen:

We received your favor of the 12th inst., and with interest noted contents. It is true that we have considered your manufacture of pattern of auto-lubricating Sky Line Blocks during the past few months, and have come to the conclusion that your pattern is interfering with our patented 'Gilchrist self-oiling Blocks.' This, our claim is based on an opinion from our Patent Attorneys at Washington, D. C., which we received a short time ago. We are surprised to learn from your letter of the existence of other patents on blocks similar to ours and as you stated having such copies in your possession and expressed

your willingness to also let us read the opinion of the Patent Attorneys, we will be very grateful if you will grant us this privilege and will duly return same to you.

Thanking you in advance for this favor, we are

Yours very truly,

WILLAPA HARBOR IRON WORKS,
John E. Gilchrist,
Per William Hegele."

(*Transcript of Testimony, pages* 73, 74 *and* 75.)

* * * * * * * * *

"November Seventeen, 1914.

Willapa Harbor Iron Works,
South Bend, Washington.

Gentlemen:

We have your letter of November 16th, and will be very glad to let you read the copy of our Attorney's opinion on Patents referred to, as well as submit copies of the Patents themselves. We think, however, inasmuch as this literature is rather bulky to send by mail, that the best plan would be for you to call at the office the next time you are in town and let us show you these papers, in person, as otherwise, they are liable to become mislaid or lost.

If, therefore, you will advise about what time you will be in Portland, will arrange to see you accordingly.

Yours truly,
F. B. MALLORY COMPANY,
F. B. Mallory, Pres."

(*Testimony, page* 76.)

* * * * * * * * *

"November 25th, 1914.

F. B. Mallory Co.,
Portland, Ore.
Gentlemen:—

We received your favor of the 17th inst. in regard to copies of your Attorney's opinion on Patents in question. While we are desirous of reading this opinion it is at this time impossible for us to leave our office and consequently have to await opportunity for this purpose. However, as we have stated in our letter previously our claims for your interference with the manufacture of the auto-lubricating Blocks are based on the statement of Attorneys at Washington, D. C.

Our Mr. Gilchrist having been absent from this office for a few days we are compelled to let the matter rest for a decision of Mr. Gilchrist.

Very truly yours,
Willapa Harbor Iron Works,
Per William Hegele."
(*Transcript of Testimony, page* 77.)

* * * * * * * * *

"April 26th, 1915.

F. B. Mallory Co.,
Portland, Ore.
Gentlemen:—

In your letter of (blurred) advised us that you had in your possession copies of prior patents of self-oiling Blocks. For the past few months we have endeavored through our attorneys at Washington, D. C., to secure these copies, but as we have been informed by them they are unable to find any records in reference to self-oiling Pulley Blocks. We therefore take the liberty of asking you to kindly

give us No. of these old patents you referred to in your favor of Nov. 17th, and for this favor we thank you in advance.

Very truly yours,
WILLAPA HARBOR IRON WORKS,
Per William Hegele."

(*Transcript of Testimony, pages* 77 *and* 78.)

* * * * * * * * *

"April Twenty-nine, 1915.

Willapa Harbor Iron Works,
South Bend, Wash.
Gentlemen:—

In reference to your letter of April 26th, our Mr. Mallory is out of town for a few days, but will undoubtedly furnish you with the information desired upon his return the latter part of next week.

Yours truly,
F. B. MALLORY COMPANY."

(*Transcript of Testimony, page* 78.)

* * * * * * * * *

"Portland, Oregon,
May 6, 1915.

Willapa Harbor Iron Works,
South Bend, Washington.
Dear Sirs:

Your letter of April 26th addressed to F. B. Mallory Company concerning the self oiling block patents, has been referred to me for answering.

In response to your request for copies of patents of self oiling blocks taking priority over your patent, I would refer you to the following references, whereupon you may send to the Patent Office for the copies, to wit:

Labadie, No. 513,067, Jan. 16, 1894,
Tarbox, No. 823,231, June 12, 1906,

Tousley, No. 520,973, June 5, 1894,
Davis et al., No. 973,177, Oct. 18, 1910,
Lindsay, No. 847,955, Mar. 19, 1907,
Lockfaw, No. 964,284, July 12, 1910,
Martin, No. 942,274, Dec. 7, 1909,
Morgan et al. (British), No. 712 of 1893.

From my examination of your patent in connection with the foregoing patents, it seems to me that there is no ground upon which F. B. Mallory Company could be considered as infringing upon your patent. I am corroborated in my opinion on this matter by Munn & Co., of Washington, D. C.

If after an examination of these patents you are still of the opinion that F. B. Mallory Company would be guilty of an infringement of your patent, kindly write to me and state the grounds upon which you base your opinion, for I wish to assure you that we would want to have a satisfactory adjustment of the matter if F. B. Mallory Company was in any way infringing upon your patent.

Very respectfully yours,

LOYAL H. MCCARTHY."

(*Transcript of Testimony, pages* 79 *and* 80.)

Witness stated that he received no further letters from the plaintiff subsequent to the letter of May 6, 1915, until about six weeks prior to the filing of this suit.

Defendant offered a logging block marked "Gilchrist—South Bend," and the same was received in evidence and marked "Defendant's Exhibit T." Concerning Exhibit "T" witness testified that it was a Gilchrist block made by the Willapa Harbor Iron

Works of South Bend, Washington, of which Works the plaintiff was manager and owner; that Exhibit "T" was bought upon the open market; that it bears patent marks, "Patented June 3, 1913," and bears no patent marks showing date December 6, 1910; that Exhibit "T" contains an oil reservoir in the side with an opening adjacent to the top, a shoulder pin, a projecting hub fitting closely into the annular recess, a hole communicating with the center of the pin in the oil reservoir, a hole extending from the interior chamber of the pin to the bearing surface of the pin; that the annular recess of the Gilchrist block is practically at right angles, furnishing almost a tight fit for the end of the hub, while in the Mallory block the recess is nothing but a rough casting and not machined nor intended to fit the end of the hub; that Mallory blocks are not made with a dust-proof hub; that blocks of the design of Exhibit "T," manufactured by the Willapa Harbor Iron Works, and designated as the Gilchrist blocks, are generally put upon the market without the patent date of December 6, 1910, upon them; referring to plaintiff's catalogue of logging blocks, witness stated that Exhibit "T" is the same general design as the block shown on pages 30 and 31 of said catalogue and marked and catalogued as "No. 151-A"; that the cut of said blocks as shown in plaintiff's catalogues has no patent markings of December 6, 1910, but bears the patent date of June 3, 1913.

Defendant offered the Gilchrist logging block with a 12-inch sheave and the same was received in evidence and marked "Defendant's Exhibit U." Referring to the last exhibit witness stated that he purchased the same in the open market, that it does not contain a "Z" shaped guard as claimed in the patent of June 3, 1913, and that it would be impossible to place such a guard on said exhibit because of the cross-head which is already on it.

Stipulated that so far as the type of oiling system is concerned Exhibits "T" and "U" are identical.

Witness stated that Exhibit "U" is on the open market, for sale generally, and carries no patent markings of December 6, 1910.

Defendant offered the Gilchrist block and the same was received in evidence and marked "Defendant's Exhibit V." Stipulated that Exhibit "V" is a Gilchrist block and is for sale on the open market. Witness stated that Defendant's Exhibit "V" has no "Z" shaped guard as described in plaintiff's patent of June 3, 1913; that the defendant has made a guard for display, and the same was offered and received in evidence marked "Defendant's Exhibit W."

UPON CROSS EXAMINATION.

The F. B. Mallory Company incorporated in 1912 under the laws of Oregon with principal office at Portland; plaintiff's Exhibit No. 1, United States Letters Patent No. 977,613 of December 6, 1910, is

specifically referred to in plaintiff's Exhibit No. 2, United States Letters Patent No. 1,067,528 of June 3, 1913; the logging blocks introduced as exhibits by plaintiff have the patent marks of December 6, 1910.

Witness admits that every block referred to by him on direct examination has its oil chamber outside of the block side, except the Gilchrist blocks.

Witness states that he is selling Defendant's Exhibit "D," although the same is not catalogued by him, the said exhibit being used as a loading block; that Exhibit "D" is not practicable for a moving block for the reason that the "cup protrudes and is liable to be knocked off"; moving blocks when in use have to plow through the dirt going over the hill and up the ravines, depending upon the nature of the country, and a smooth block with any protrusion on the side is impractical for moving purposes; Exhibit "D" form of block is practical as a loading block.

"Q. Then if you have an A-frame, and your block is hung from the top of the A, where the sides cross, no matter how long or short it may be, it is bound to strike the leg, isn't it?

"A. Not necessarily. It can be hung so it won't hit the legs.

"Q. I don't understand how you could hang anything from the forks of two crossing timbers, from the top of the A in such a way that it would not swing and hit either one of the legs.

"A. You have an A-frame. It simply depends on the angle you describe on the leg of the frame

whether you swing them close together, or whether you keep them apart, or whether the straps are swung long or short, so as to give the block sufficient clearance between the legs.

"Q. If hung from the joinder of the two, it is bound to hit the legs?

"A. Yes, but a logger would not make it that way if he were a real logger."

(*Transcript of Testimony, page* 94.)

A trip line block is a small block through which the main line is hauled back to the woods after bringing in its load to the donkey engine; the "trip-line" block is sometimes called a "haul-back" block; a trip-line is attached to a tree or a stump at the point of the angle in the main line, and under extraordinary conditions may have to sustain a strain of several tons, but for ordinary purposes not as much as that; when the weight is released from the main line or when the line breaks, the blocks are liable to end up, fly around, and hit against the stump, and the line may break and wrap around the stump; under such circumstances, the stove-pipe protusion of Exhibit "D" might be broken off.

Exhibit "D" with the stove-pipe reservoir would not be a practical block to use as a high-lead block, and would not last five minutes on high-lead work.

The sides of Plaintiff's exhibit 6 are interchangeable and made in the same pattern and this is true of all defendant's high-lead blocks.

Before the report from Mr. Gillespie of complainant's objection to my manufacture of auto-lubricating blocks, I had heard indirectly that the complainant had made remarks about the blocks we were making probably a few weeks before the report from Mr. Gillespie; received the report from Mr. Gillespie in November, 1914, and I wrote to Mr. Gilchrist on November 12, 1914, receiving his reply thereto of November 16, 1914. I received Mr. Gilchrist's letter of November 16, 1914, in which he said: "It is true we have considered your manufacture of pattern of auto-lubricating self-oiling blocks during the past few years and have come to the conclusion that your pattern is interfering with our patented Gilchrist Self-oiling Block."

The complainant by his letter of April 26, 1915, states that "for the past few months we have endeavored through our attorneys at Washington, D. C., to secure these copies, but, as we have been informed, they are unable to find any record in regard to self-oiling pulley block," and he asks me for reference to such patents; I referred his letter to my attorney, Mr. McCarthy, who on May 6, 1915, furnished complainant with a list of the patents requested; I don't know what the complainant did with that list of patents, although he stated that it was his purpose to submit them to his attorney at Washington; if I remember right, I never heard anything more from the complainant about this patent business until the spring of 1919.

"Q. You never heard anything that he said about your manufacture?

"A. Heard plenty that he said, yes.

"Q. In which he was complaining?

"A. In which he was criticising us, and calling us a great many names.

"Q. Yes, for your infringement manufacture?

MR. McCARTHY: Unless I might forget it, that letter was just brought up again. I have that date to supply. I found originally missing that letter, April 26th. The date in the first line is "In your letter of November 17, 1914, you advised us." (Referring to Complainant's Exhibit 29.)

"Q. So the last you heard from Gilchrist was in May, 1915, when you sent him the patents. Did you take the 'Timberman' of February, 1916?

"A. I did.

"Q. I show you a 'Timberman' of February, 1916, and call your attention to page 20 thereof. Did you see that as it was published?

"A. I suppose I did. I am a regular subscriber to the 'Timberman.'

"Q. And your advertisement appears on page 22?

"A. Of the same number.

MR. PECK: We would introduce this 'Timberman' in evidence, and I want to read this into the record. * * *

"Notice to users of self-oiling blocks: I am the original inventor and patentee of self-oiling blocks under patents issued December 26, 1910, June 3, 1913. I hereby give notice that I will hold legally responsible in damages all infringements of my patents covering the principle of

a hollow chamber carrying a lubricant to lubricate the sheave pin. (Showing cut of the block.) Gilchrist, the original self-oiling block universally used. Willapa Harbor Iron Works, John M. Gilchrist, Patentee."

(*Book introduced in evidence and marked "Complainant's Exhibit 9."*)

"Q. How long was this notice, for how many successive months was this notice carried in the 'Timberman'?

"A. I couldn't tell you that.

"Q. You have examined these files recently?

"A. Yes, but I don't know exactly how many months it was carried. For several months, but I can't tell you exactly how many. Three or four, possibly longer. I can't tell you exactly.

MR. PECK: Can't we stipulate was carried six successive months?

MR. McCARTHY: I don't know. Look through the numbers. They are there. If you look through and find them, we will stipulate to anything you can show me. By my statement I wouldn't want to admit as evidence; because I contend it is not competent evidence at all.

COURT: Merely the fact.

MR. McCARTHY: Yes.

"A. I think that is correct.

MR. PECK: From February to July, inclusive, 1916.

"A. I think so.

MR. PECK: It is stipulated from February to July, 1916, this advertisement was carried (*Exhibit* 9).

"Q. I also show you the 'Timberman' of August, 1916, and ask you if you are familiar with that ad-

vertisement of Gilchrist, as shown on page 22? Did you see this advertisement shown on page 22 of this 'Timberman'?

"A. I did.

"Q. And that advertisement has been carried to date?

"A. I think so.

(*Offered in evidence and marked "Complainant's Exhibit* 10.")

"Q. Your own advertisement was running in these 'Timberman' which have been stipulated into the record, and admitted as evidence, on these self-oiling blocks, were they not?

"A. Yes."

(*Transcript of Testimony, pages* 101, 102 *and* 103.)

I first heard of the Gilchrist blocks in about 1910 and 1911; I sold a few of complainant's blocks at that time subsequent to the issuance of the patent in suit; I don't know whether they were marked patented at that time or not. I ordered such blocks from the Willapa Harbor Iron Works (the complainant's trade name) and sold them to the trade. I first began the manufacture of my self-oiling block in March, 1914; the Clarke County Iron Works made the patterns for me in February, 1914.

"Q. Who made your drawings?

"A. There were no drawings.

"Q. No drawings to make the patterns from?

"A. No drawings to make the patterns from.

"Q. What were the patterns made from?

"A. They were made from ideas that were given to the pattern makers. Strange as it may seem—I will say for a long time—strange as it may seem, although we commenced making blocks in 1907, we didn't have a complete set of drawings on any of our blocks; in fact, didn't begin the complete set of drawings, that is, regular mechanical drawings, until this year.

"Q. So you had no drawings?

"A. We had no drawings.

"Q. For this improved block? What were the patterns made from?

"A. From sketches that I submitted to the pattern maker or salesman.

"Q. Where did you get these suggestions from?

"A. From my imagination, I suppose, ideas that came.

"Q. You had seen the Gilchrist block, hadn't you?

"A. I had.

"Q. You had one there in your shop, didn't you?

"A. Not at that time.

"Q. Now, Mr. Mallory, didn't you have a Gilchrist block in the shop at the time you made the sketches for your block?

"A. According to my memorandum, all the Gilchrist blocks were sent back to them about six or seven months after we sold the first one. I don't think we kept any stock of them. Gilchrist consigned us a stock of his blocks at one time, and we afterwards returned them. Whether or not there was a block bought afterwards, I cannot tell you exactly.

"Q. How long before you got your patterns in February, 1914, was it you were making these sketches?

"A. Commenced working on blocks of that design along the fall of 1913.

"Q. What time in the fall?

"A. I can't tell you; I think along in October or November.

"Q. October or November, 1913, was when you began making your sketches?

"A. I think so, yes.

"Q. What did you do with the blocks which you ordered from the Willapa Harbor Iron Works, of date October 31, 1913, and ask you if you sent the original, of which that is copy?

"A. I presume I did; signed by F. B. Mallory Company.

"Q. You don't deny it?

"A. I don't deny it, no.

MR. PECK: We offer the telegram in evidence.

(*Marked 'Complainant's Exhibit* 11.')

Portland, Oregon,
October 31, 1913.

Willapa Harbor Iron Works,
South Bend, Washington.

Express twelve inch trip block oil reservoir cross head and hook. Ship today by freight two only twenty-four inch Hercules logging jacks number two. One only number three."

"Q. You have a record in your office which shows where you sold those blocks?

"A. Where we sold them?

"Q. Yes.

"A. To whom they were sold, you mean?

"Q. Yes.

"A. Yes.

"Q. We will ask you to produce the record during this trial showing to whom this block was sold and when it was sold, which was ordered pursuant to telegram, Complainant's Exhibit 11."

(*Transcript of Testimony, pages* 105, 106 *and* 107.)

On April 27th, 1911, I wrote to complainant as follows:

"Willapa Harbor Iron Works,
South Bend, Washington.
Gentlemen:

Please advise what sizes of your new trip line block you are now making, together with prices on same. If not ready, how soon will they be? Furthermore, will you be agreeable to give us exclusive sale of these blocks in Oregon and Southern Washington? If so, at what discount? Should you give us sale of these blocks, we will see to it that proper advertising matter is issued and we will advertise them in the Timberman and endeavor to promote sale in every way possible. We would, however, want a contract for a certain length of time as otherwise it would not pay us to have cuts made and start the advertising campaign.

Awaiting your reply, we are,

Yours very truly,
F. B. Mallory Company.
Manager."

To which complainant replied as follows:

"April 29, 1911.

F. B. Mallory and Co.,
Portland, Oregon.
Gentlemen:

Your esteemed favor of 27th inst. to hand and in reply would say the only sizes of the new Gilchrist self-oiling blocks we have on hand at present are 8-inch, 9-inch and 14-inch; we have only a limited number of these blocks as we are not yet prepared to supply the frame, and it will probably be some time this coming fall before we will be in a position to do so. The reason for this is that we have had considerable trouble in getting suitable castings from the east. The Columbia Steel Company of your city tried, and made a failure of them, but we now have an order for several hundred of these block shells placed with an eastern steel company and if they are satisfactory we will place an order for a car load of the different sizes; we propose making these blocks in sizes from 8-inch trip line blocks to 18-inch head blocks with swivel and hook and with goose neck. All our blocks will be made in future on the self-oiling principle. We have several patents on other blocks and when all are completed, we believe we will have a line of logging tools which will be hard to beat. Our new Hercules log jack No. 3 is being made for us in Milwaukee from a special grade of open hearth steel, and we expect to be able to sell this jack to the trade for $25.00; all parts except the frame are interchangeable with the Hercules No. 2 . In some respects we consider it the better jack of the two.

We are not yet in a position to make terms for

handling these tools, but shall be pleased to take the matter up with you later on.

Thanking you for your courtesy, we are,

Yours respectfully,

WILLAPA HARBOR IRON WORKS.

G

(*Transcript of Testimony, p.* 109 *p.* 110/1.)

My advertisement on page 24 of the 'Timberman' of March, 1914, is the first advertisement of my auto-lubricating block. Said advertisement received in evidence and marked "Plaintiff's Exhibit 12."

Page 24 of the "Timberman" of April, 1914, is my announcement of the manufacture of my auto-lubricating blocks. Said page 24 received in evidence and marked "Plaintiff's Exhibit 13."

Under the old system of ground logging, logs were hauled on the ground, but in later years a high-lead system of logging has been developed whereby the nose of the log is led off the ground by the main line passing through a high-lead logging block hung in a spar tree or a gin pole; at first the blocks were only hung 40 feet above the ground; now some of the larger blocks hang 175 or even 200 feet above the ground; as the nose of the log is lifted, the log clears obstructions and does not dig up the ground.

The sky-line system is a suspension or trolley system like the carry baskets in a department store, whereby the log is picked up bodily and carried clear of the ground. In either the high-lead or sky-line system of logging the high-lead logging blocks are necessary.

In my catalogues where logging blocks are marked

"Patent Applied For," this refers to a design patent.

Page 22 of the "Timberman" of October, 1915, identified by the witness as the advertisement of the defendant and introduced in evidence and marked "Plaintiff's Exhibit 14."

I don't think that this advertisement, Complainant's Exhibit 14, refers specifically to overhead equipment; we manufacture other blocks besides high-lead and sky-line blocks upon which we have some mechanical patents. This is a general advertisement. One of my sky-line blocks introduced in evidence here is a part of Diamond "M" overhead equipment.

Stipulated that advertisement of the Willapa Harbor Iron Works as shown on page 32 of the "Timberman" of July, 1912, ran from January to July, 1912, and such advertisement was introduced in evidence and marked "Complainant's Exhibit 15."

Stipulated that the advertisement of the Willapa Harbor Iron Works as shown on page .... of the "Timberman" dated March, 1914, ran from March, 1914, to January, 1916, inclusive, and such advertisement was introduced in evidence and marked "Complainant's Exhibit 16."

UPON RE-DIRECT EXAMINATION:

This aluminum block No. 19 is an exact duplicate and representation of our regular No. 19 trip-line or haul-back block, and this aluminum block No. 49 is exactly the same in construction as our No. 49 introduced here as our Exhibit No. 6. Said alumi-

num patents were introduced in evidence and marked "Defendant's Exhibits 'X' and 'Y,' " respectively.

I made the application for design patent upon these blocks because a designed patent is very inexpensive and it was the design we wanted to protect more than anything else; I did not think that there was any mechanical function to be patented nor anything new about these blocks; we are still operating under design patents.

Witness identifies the design patent No. 45,911, issued to F. B. Mallory upon June 9, 1914, as the patent under which he makes his line guard, and the same was introduced in evidence and marked "Defendant's Exhibit Z."

UPON RE-CROSS EXAMINATION:

In the latter part of 1914, possibly in September or October, I first took up with my attorneys the question of the patentability of the auto-lubricating blocks.

TESTIMONY OF WILLIAM J. BAKER, called as a witness on behalf of the defendant:

My occupation is that of commercial artist, having been engaged in that business for about 20 years, and in connection with that business I have been called upon from time to time to make drawings of mechanical devices as well as drawings from pictures and patents; I was employed by the defendant to make drawings of patents for publications and

I made a drawing of the device shown in the Gilchrist Patent No. 977,613; the drawings introduced in evidence and marked "Defendant's Exhibit AA."

Witness likewise testifies that he made a drawing of the Morgan Patent No. 712-1893, and the same was introduced in evidence and marked "Defendant's Exhibit BB." With reference to Defendant's Exhibit "BB" witness admits that he does not show the oil cup as being riveted on the block side.

Witness identifies drawing from Labadie Patent No. 513,067, and such drawing is introduced in evidence and marked "Defendant's Exhibit CC." Witness identifies his drawing for reproduction of figure 3 of the Labadie Patent, admitting that he had broken away the parts as shown in the original in order to more clearly disclose the oiling system, and such drawing was introduced in evidence and marked "Defendant's Exhibit DD."

Witness identifies his drawing from the Ludford Patent No. 844,159 and the same was introduced in evidence and marked "Defendant's Exhibit EE." Witness identifies his drawing of the side shown in figure 1 of the Labadie Patent with a portion thereof broken away, and the same was introduced in evidence and marked "Defendant's Exhibit FF." Witness identifies his drawing of the cut shown in the January, 1908, "Timberman," and the same was introduced in evidence and marked "Defendant's Exhibit GG."

UPON CROSS EXAMINATION:

I have never seen the original block from which Defendant's Exhibit "GG" is drawn, and the changes in the drawing from the original are a result of the change in the position from which the drawing was made; I assume the cross section was as represented by my drawing, although I had never seen the original block.

Referring to Defendant's Exhibit "FF," I never saw the original block.

Referring to figure 2 of the Morgan Patent of Defendant's Exhibit "BB," I admit that the illustration in figure 2 of the Morgan Patent shows that the plate forming the oil cup is riveted on the side of the pulley block, while such feature of riveting is not shown on Defendant's Exhibit "BB."

> "MR. McCARTHY: In response to counsel's request for the letter with reference to taking this matter up with the patent attorneys in Washington, D. C., I have the letter here dated July 7, 1914."
>
> (*Transcript of Evidence, page* 130.)

TESTIMONY OF C. B. BORQUIST, called as a witness on behalf of the defendant:

I am a resident of Portland, Oregon, occupation—machinist since 1903; have been a partner in Borquist Brothers Manufacturing Company, who were engaged in the manufacture of logging blocks for nine years in Portland; have not been engaged in manufacturing logging blocks since 1912; began making logging blocks in 1903; I made a logging

block with a long bearing, long pin and long hub since 1903; the long pin came in a couple of years later, about 1905 or 1906; as long as I was in business it was common custom to drill a hole in the end of the pin with a cross drilling from the center of the pin to the bearing surface of the pin; my brother and I got out a patent on an oiling device evidenced by United States Letters Patent No. 760,378.

Said United States Letters Patent No. 760,378 were introduced in evidence and marked "Defendant's Exhibit HH."

I am familiar with the construction of a logging block with an oil reservoir elbow similar to Defendant's Exhibit "C," and we manufactured a few of that character with an axial opening through the pin carrying the oil by a cross-drilled hole to the bearing surface; we manufactured blocks with an oiling system of this character as far back as 1906 or 1907; am not familiar with an extension or barrel on the elbow as evidenced by Defendant's Exhibit "D"; have manufactured block sides, with annular recesses so as to give a long hub or bearing place, since 1905 or 1906, and I designed and made a 16-inch over-head trip-line block of that description; these different makes of blocks were sold on the open market and used in the logging camps in this section of the country; this type of logging block with a shouldered pin and the elbow oil reservoir, hole in the pin, recesses in the sides, and hubs extending into the recesses, were not common at first but after I

got mine out, became very common during the latter part of 1907; the shouldered pin similar to Defendant's Exhibit "E" was a common method of construction since 1903; the Bouse block came on a few years later.

UPON CROSS EXAMINATION:

My patent of May 17, 1904, had no reference to long or short bearings and did not show in combination an interior oil chamber in one of the sides of the block; none of the blocks to which I have referred had an interior oil chamber in the side of the block; they all worked with hard grease or heavy oil.

UPON RE-DIRECT EXAMINATION:

Heavy oil was used in the elbow reservoir when I was in business.

TESTIMONY OF JAMES J. GEARY, called as a witness on behalf of the defendant:

My residence is at Klatskanie, Oregon, occupation blacksmithing since 1888 with particular reference to the construction of logging blocks; made logging blocks off and on since 1888 and have had practical experience as a logger in the woods and as a logger's blacksmith. I have seen the logging block shown in Defendant's Exhibit "M," and know its construction; don't know as I saw it as early as January, 1908, but along about 1908, 1909 or 1910, somewhere in there. I recall the dust-proof feature, the recesses in the sides in which the long hub fitted, an oil

chamber in the center of the pin, and the hole leading from the oil chamber to the bearing surface of the pin.

"MR. CARY: I would like to assist in saving a little time if we could; undoubtedly they are old in the art, long pin and long sheaves, and annular recesses in the sides of the blocks are old.

"MR. McCARTHY: If counsel will stipulate that blocks with long bearing pins, annular recesses in the sides, in which the hubs fit, with an oil chamber extending through to the bearing surface of the pin, it will save considerable time in connection with this matter.

"MR. CARY: We admit, of course. You can find these old elements in the prior art.

"COURT: You admit they were in use prior to your invention?

"MR. PECK: We admit the separate features but don't admit the combination feature, those you have named. We don't admit any oil chamber in the side, or the cheek, before that."

(*Transcript of Testimony, pages* 138 *and* 139.)

The placing of a connecting member between the two spanners of the line guard so as to form the letter "H" is a matter which would suggest itself to me as a mere matter of convenience in the making of these parts for assembling; I am familiar with the style of block and oiling system as shown in Defendant's Exhibit "C," and have made several such blocks; have known the elbow oil cup since 1903; blocks similar to Exhibit "C" were used to some extent, not by everybody but in several camps that

I know of; have made blocks with the extensions on the elbow similar to Defendant's Exhibit "D"; we filled the extension with waste and used heavy machine oil; the purpose of adding the extension was to make more oil capacity; I made blocks of this character since 1903; it was quite common to hang a block up and put one of these extensions on, fill it with waste and oil, and there it was supposed to hang up, off the ground, as side blocks.

UPON CROSS EXAMINATION:

"Q. Any of these blocks which you have described, was the oil chamber contained in the side of the pulley? Was it an interior oil chamber in the side of the pulley?

"A. No."

UPON RE-DIRECT EXAMINATION:

A logging block of the type of Defendant's Exhibit "D" is as practicable as any other style of block for the purpose of furnishing lubrication for the bearing as long as the reservoir remains in shape; the reservoir does not often get knocked off.

UPON RE-CROSS EXAMINATION:

The block with the extension elbow could be used as a trip-line block; it could not be used as a head block; this extension elbow block would not be a modern block for use in modern logging; there was no interior oil chamber in the side of the block in Defendant's Exhibit "M."

TESTIMONY OF F. B. MALLORY, recalled as a witness on behalf of the defendant:

"Q. Mr. Mallory, this forenoon counsel for the plaintiff requested you to furnish certain additional evidence; one was with reference to an order for the Gilchrist block and what became of it, I believe; have you that information now?

"A. I have, yes.

"Q. Please state.

"A. In our catalogue No. 5 we illustrate some Gilchrist blocks from some cuts that he had furnished us or authorized us at that time, and in an order received from the Pelican Bay Lumber Company under their date of October 28, 1913, we received an order for a trip-line block figure 410 No. 413, 12 by 1 1-4 sheave, which corresponds with catalogue number and figure number we use for the Gilchrist block; that order was written up and all of it was shipped the 1st of October, with the exception of the block; the block evidently having been ordered from the Willapa Harbor Iron Works by telegram that day, and showing shipment to the Pelican Bay Lumber Company under invoice dated November 5 as a back order.

"Q. Now, is that the block which was referred to in order which you sent to Gilchrist which has been referred to in testimony this morning?

"A. It was.

"Q. Who was sold the block?

"A. Sold to Pelican Bay Lumber Company, Klamath Falls, Oregon.

"Q. And shipped within what time after the receipt of the block?

"A. Shipped within a day or so; probably the same day the block arrived. The orders are here, and the orignial request from the Pelican Bay Lumber Company.

MR. McCARTHY: We don't care to destroy our records, but are willing to substitute a copy.

"Q. Have you a copy of this?

"A. I have not.

MR. McCARTHY: We are willing for you to examine this and will substitute copies if you wish them.

MR. PECK: We don't care anything about it.

"Q. What else was it?

"A. They wanted to know about an order we sold last week for an extension reservoir.

"Q. Oh, yes, have you a copy of that order with you?

"A. Yes. Sold to Pullian and Rice, Klatskanie, Oregon, one only number 74 Mallory Loading Block with 8-inch pipe extension. There is the order date of the duplicate.

"Q. Was that the same block which is represented here on defendant's Exhibit D?

"A. No, that is not the same block; it is a block that is made with a larger sheave for loading purposes, but the oil cup that was employed on this block is the same in design as the one in that exhibit.

"Q. And the extension pipe?
"A. The extension pipe.
(*Transcript of Testimony, pages* 144-5.)

UPON CROSS EXAMINATION:

I had the drawings of a cross section of the Gilchrist block as shown on page 24 of my catalogue No. 5 in my possession in 1913; they were drawings that had been furnished by Mr. Gilchrist for the purpose of illustrating my catalogue; these drawings show all information connected with the Gilchrist blocks which I could have obtained if I had taken the block down.

TESTIMONY OF CHARLES B. HIRSCHBEUHL, called as a witness on behalf of the defendant:

My occupation is running the machine shop of the Clarke County Iron Works of which I am the principal stockholder; machinist by trade and have had practical experience for 40 years; have been engaged as a machinist in this part of the country for 32 years and have conducted the business of Clarke County Iron Works since 1910, prior to that time, for about two years, was with the Columbia Steel Works; have had experience in the machining of logging blocks since August, 1907; I do the machine work on the logging blocks of the defendant and since 1911 I have done such work. I recall the circumstances of making a logging block for F. B. Mal-

lory with an oil reservoir in the sides, I guess in 1914—might have been the latter part of 1913.

"Q. Did you have any drawings to aid or assist you in the making of that block?

"A. No.

"Q. Will you kindly explain to the court just how that oil reservoir block was developed and from what information you started and how you completed it?

"A. Well, Mr. Mallory, he was anxious to get a block with an oil reservoir side, so he used to come over. Of course, he was a large customer of ours and he always had lots of work done at the shops, so Sunday morning was a convenient time for him to come over and talk matters over, so we were talking over this block one time and he asked me if there couldn't be a way devised without much expense and without too radical a change to make an oil block—an oil side—a block side with an oil reservoir. So it happened that we were walking through the shop and we just noticed this block side here.

"Q. What are you referring to?

"A. This 106 block side.

"Q. Is that a block side of the F. B. Mallory construction?

"A. Yes, sir.

"Q. Is that a regular stock side that was used at that time?

"A. Yes. So whether he suggested or I did, I don't remember, but anyhow, we thought of raising these ribs up, and curving the thing up, and coring a channel in towards the pin so the oil this would con-

tain would flow towards the pin. That is how that came about.

"Q. You referred to raising the ribs that extend from the hub to the lugs at the upper part of the shell?

"A. No, to raise this from here; make it deeper.

"Q. That is what I mean. But in referring to the ribs, you referred to these ribs which extend from the hub to the lugs on the shell?

"A. Yes, sir.

"Q. The idea was to make these ribs deeper?

"A. Yes, sir.

"Q. And cover them over?

"A. Yes, sir.

"Q. So that you formed a reservoir?

"A. Yes, sir.

"Q. Did anybody else aid or assist you in any way to the completion of that work?

"A. No.

"Q. That is all your own planning?

"A. Yes."

(*Transcript of Testimony, pages* 148 *and* 149.)

I thought we were the first to design this style of a block; practically from the beginning I manufactured blocks with an elbow on the end of the pin similar to Defendant's Exhibit "C"; also similar to Defendant's Exhibit "B," but couldn't say just how far back that went.

The development of the Mallory block required no more than ordinary mechanical ability; I do not claim

to be an inventor and have no particular bent along the line of invention any more than any person who runs into difficulties and tries to overcome them.

UPON CROSS EXAMINATION:

MR. CARY: The business relations between you and the Mallory Company have been pretty close, haven't they?

"A. Pretty close.

"Q. Mr. Mallory suggested to you, didn't he, that he wanted a block with an oil reservoir?

"A. Yes, sir.

"Q. You didn't think of it yourself?

"A. No.

"Q. Then you discussed with him ways and means of doing it?

"A. Yes.

"Q. Will you say it wasn't Mr. Mallory who told you how to do it?

"A. Yes, I will say that—

"Q. Did you talk it over together?

"A. Yes; I couldn't say who suggested that way; whether it was him or myself.

"Q. You won't say it was not?

"A. No, I wouldn't say it wasn't."

(*Transcript of Testimony, page* 151.)

I never saw a Gilchrist block side prior to the time I made the first Mallory block side; the first conversation with Mr. Mallory was probably in the fall of 1913; as soon as we talked the matter over and settled

about the way we would proceed, he gave me an order to make a block side and we made the first block side in February, 1914.

The block side referred to by witness Hirschbeuhl was introduced in evidence and marked "Defendant's Exhibit I." Defendant then introduced certain patents which were marked as follows:

United States Letters Patent 8,950, issued to C. H. Platt May 18, 1852. Marked ~~Complainant's~~ Defendant's Exhibit "JJ."

United States Letters Patent 115,248, issued to Henry Smith May 23, 1871. Marked Defendant's Exhibit "KK."

United States Letters Patent 189,773, issued to J. W. Norcross April 17,1877. Marked ~~Complainant's~~ Defendant's Exhibit "LL."

United States Letters Patent 241,703, issued to J. W. Norcross May 17, 1881. Marked ~~Complainant's~~ Defendant's Exhibit MM."

United States Letters Patent 304,103, issued to J. B. F. Herreshoff August 26, 1884. Marked ~~Complaintiff's~~ Defendant's Exhibit "NN."

United States Letters Patent 390,341, issued to A. E. Brown October 2, 1888. Marked ~~Complainant's~~ Exhibit "OO."

United States Letters Patent 492,550, issued to T. R. Farrell February 28, 1893. Marked ~~Complainant's~~ Defendant's Exhibit "PP."

United States Letters Patent 513,067, issued to J. R. Labadie January 16, 1894. Marked ~~Complainant's~~ Defendant's Exhibit "QQ."

United States Letters Patent 520,973, issued to E. M. Tousley June 5, 1894. Marked ~~Complainant's~~ Defendant's Exhibit "RR."

United States Letters Patent 610,172, issued to I. M. Dotson September 6, 1898. Marked ~~Complainant's~~ Defendant's Exhibit "SS."

United States Letters Patent 644,729, issued to W. W. Bouse March 6, 1900. Marked ~~Complainant's~~ Defendant's Exhibit "TT."

United States Letters Patent 699,518, issued to E. B. Hammond May 6,1902. Marked ~~Complainant's~~ Defendant's Exhibit "UU."

United States Letters Patent 760,944, issued to G. Agobian May 24, 1904. Marked ~~Complainant's~~ Defendant's Exhibit "VV."

United States Letters Patent 765,475, issued to J. E. Gilchrist, the complainant in this suit, July 19, 1904. Marked ~~Complainant's~~ Defendant's Exhibit "WW."

United States Letters Patent 769,998, issued to A. D. Foote September 13, 1904. Marked ~~Complainant's~~ Defendant's Exhibit "XX."

United States Letters Patent 779,437, issued to G. Nettle January 10, 1905. Marked ~~Complainant's~~ Defendant's Exhibit "YY."

United States Letters Patent 780,280, issued to Herbert Gilley January 17, 1905. Marked ~~Complainant's~~ Defendant's Exhibit "ZZ."

United States Letters Patent 786,790, issued to G. W. King, H. J. Barnhart, and C. D. King April 4, 1905. Marked ~~Complainant's~~ Defendant's Exhibit "3A."

United States Letters Patent 806,562, issued to Andrew Opesal December 5, 1905. Marked ~~Complainant's~~ Defendant's Exhibit "3B."

United States Letters Patent 823,231, issued to A. B. Tarbox June 12, 1906. Marked ~~Complainant's~~ Defendant's Exhibit "3C."

United States Letters Patent 844,159, issued to Enoch Ludford February 12, 1907. Marked ~~Complainant's~~ Defendant's Exhibit "3D."

United States Letters Patent 845,041, issued to Andrew Opesal February 19, 1907. Marked ~~Complainant's~~ Defendant's Exhibit "3E."

United States Letters Patent 847,955, issued to J. N. Lindsay March 19, 1907. Marked ~~Complainant's~~ Defendant's Exhibit "3F."

United States Letters Patent 869,422, issued to William H. Corbett October 29, 1907. Marked ~~Complainant's~~ Defendant's Exhibit "3G."

United States Letters Patent 876,176, issued to Bennett W. Hammond January 7, 1908. Marked ~~Complainant's~~ Defendant's Exhibit "3H."

United States Letters Patent No. 880,805, issued to James Mattson March 3, 1908. Marked ~~Complainant's~~ Defendant's Exhibit "3I."

United States Letters Patent No. 898,121, issued to H. J. Littler September 8, 1908. Marked ~~Complainant's~~ Defendant's Exhibit "3J."

United States Letters Patent 942,274, issued to E. Martin December 7, 1909. Marked ~~Complainant's~~ Defendant's Exhibit "3K."

United States Letters Patent 964,284, issued to J. A. Lockfaw July 12, 1910. Marked ~~Complainant's~~ Defendant's Exhibit "3L."

United States Letters Patent 973,177, issued to S. J. and P. W. Davis and C. McCready October 18, 1910. Marked ~~Complainant's~~ Defendant's Exhibit "3M."

United States Letters Patent 984,141, issued to J. T. Johnson February 14, 1911. Marked ~~Complainant's~~ Defendant's Exhibit "3N."

British Patent No. 712—1893—issued to David John Morgan and William Guy Nixon. Marked ~~Complainant's~~ Defendant's Exhibit "3-O."

British Letters Patent 5657—1896—issued to Jens Christian Wurtzen Kjelgaard. Marked ~~Complainant's~~ Defendant's Exhibit "3P."

British Letters Patent No. 4127—1901—Series, issued to Thomas Reed Dyne. Marked ~~Complainant's~~ Defendant's Exhibit "3Q."

TESTIMONY OF HENRY L. REYNOLDS, called as a witness on behalf of the defendant:

My residence is Seattle, Washington, occupation, patent attorney and patent expert; established an office in Seattle in 1891 as patent attorney and have practiced there since, except for a period of eight years when I was engaged in practice as a patent attorney in New York City, being associated with Munn and Company and with Gifford and Bull; graduated from the University of Illinois in a course of mechanical engineering; then for a period of one and one-half years was employed as draftsman and designer in shops in the East; then received appointment as Assistant Examiner in the United States Patent Office at Washington, D. C., holding such position for two and one-half to three years, being assigned to the division of the Patent Office handling patents of a mechanical nature.

Referring to Claim 1 of Gilchrist Patent No. 977,-613, I would first call attention to the British Patent to Morgan of January 12, 1893, No. 712.

"A. In comparing Morgan's patent with the terms of claim 1 of the Gilchrist patent 977,613 I find every element of the claim in the Morgan patent in a similar type of construction, working and functioning in a similar way to secure a similar if not identical result. In fact, the resemblance between the two is unusually near and apt.

Q. Now, I will ask you, Mr. Reynolds, from your experience in the patent office, what you would say

would have been done as to claim No. 1, had the Morgan patent been called to the attention of the Patent Office or the Examiner?

MR. CARY: We have file wrapper showing just what was done in the Patent Office.

COURT: That would be the best evidence.

MR. McCARTHY: The file wrapper doesn't show. You don't claim it shows the Morgan Patent cited?

MR. CARY: It shows what the Patent Office did, and if the Patent Office looked over the prior patents and came to the conclusion the Morgan was not an anticipation, it wouldn't cite it and it wasn't cited.

Q. Is such the case, Mr. Reynolds?

A. If they had seen it, they would probably have cited it. It happens often that they overlook things of that sort. The examiners in the Patent Office are human. They miss things at times, and I have known lots of cases where references existed in the Patent Office and were not found by the examiners at the time of handling the case, and which later have developed and have been sufficient to annul the patent.

Q. Can you conceive of such a claim as claim I of the Gilchrist patent having been allowed, if the Patent Office's attention had been directed to the Morgan Patent?

MR. PECK: Objected to as incompetent, irrelevant and immaterial.

COURT: I don't think his opinion as to what the Patent Office would do or would not do is a circumstance.

MR. CARY: The Patent office records show what it did.

MR. McCARTHY: It doesn't show the Morgan Patent.

COURT: You might just as well inquire what the Supreme Court would have done had certain evidence been presented. What we want to know is whether or not this is a patentable invention.

(*Transcript of Testimony, pages* 163-164.)

UPON CROSS EXAMINATION:

The interior oil chamber of the Morgan patent is indicated by the figure "J" prime, and is formed by riveting on a plate which has been cupped and flanged out; the oil cup of the Morgan patent is integral with the side in that it is fixed and not removable, although riveted to the side; would be practical construction if a tight joint is secured.

"Q. Is that suitable to modern logging? Would that last in the woods today? A flimsy structure of that kind?

"A. I don't wish to try to qualify as an expert in logging matters and I think I had better not pass on that question."

I can make a block of the type of the Morgan block which would be successful in the woods.

UPON RE-DIRECT EXAMINATION:

Steam boilers are riveted and subjected to a pressure of 600 pounds; the Morgan patent describes the construction of the oil cup, and under the usual license given any inventor he could make that an integral cast construction if he saw fit and still be the

same thing from the standpoint of a patent; the side of the Gilchrist patent would fall within the claims as described in the Morgan patent; the construction would also fall within the terms of the claim of the Gilchrist patent as well; from a patent standpoint the construction of either the Gilchrist Block or the Morgan Block could be read into the claims of either the Gilchrist patent or the Morgan patent and from a patent standpoint the two are the same."

I have considered the Ludford patent No. 844,159, and I find that one of the sides of the pulley block described in the Ludford patent is provided with an interior oil chamber having an inlet near the top as expressed in the Gilchrist patent; the Ludford patent also has a bearing pin terminally mounted in the side but this bearing pin has no axial opening communicating with the chamber and extending through the side wall of the pin; it has been pointed out that the interior oil chamber of the Morgan patent is formed by an attached plate. The Ludford patent shows a similar chamber for a similar purpose located in a similar place but integrally cast, and in view of the state of the art as shown by Ludford there would be no invention in the use of the Ludford type of construction in making the oil chambers of the Morgan block. It is there suggested—part of the prior art to which everybody has access.

UPON RE-CROSS EXAMINATION:

The Ludford patent does not show an axial bore in the shaft nor a sheave rotating on a pin; the pin

rotates on a sheave with two borings on each side and to that extent it does not operate in the same way as the Gilchrist pulley block.

UPON RE-DIRECT EXAMINATION:

Defendant's Exhibit "FF" correctly shows the construction under the Ludford patent.

The Labadie patent No. 513,067 is of a trolley wheel and a manner of oiling the same.

"A. In explanation of this I would say that there is what is known as a harp on the trolley wheel, meaning a yoke, or the two arms between which the wheel is mounted, represented by the reference character A, and as shown in the drawing, these are made hollow so as to serve as an oil chamber; there is a small chamber, E, located in the head of this harp, so that when the trolley is in working position it will be above the pin upon which it turns. This small chamber communicates with the large chamber, D, by a small passage, a. The small chamber communicates with the pin receiving bearing by a small passage, e. The trolley axle is shown in figure 1 as being bored axially and then crosswise, so as to distribute the oil to the trolley wheel. The ends of this pin, H, of the Labadie patent are screwed into the sides of the harp. These sides correspond to the side pieces of a sheave wheel—of a block. Now, in applying claim 1 of the Gilchrist patent, 977,613, to this: This claim reads 'a pulley block consisting of sides.' These are found in the Labadie patent, consisting of two parts, AA. 'One of which is provided with interior oil chamber.'

Both of the sides of the Labadie patent are provided with interior oil chambers. Also they have an inlet adjacent to the top of the block. The filling inlet in the Labadie patent is the inlet i.

"Q. See that cap on that inlet?

"A. I think it is intended for O; is evidently used to close that. There is a bearing pin terminally mounted in the sides; in fact it is mounted identically in the same way as in the Gilchrist patent, that is, by screwing into the sides. It also has an axial opening communicating with the chamber and extending through the side wall of the pin, that is by the cross bores. There is also a sheave journaled for rotation upon the pin between the sides. In other words I find in the Labadie patent every element of claim 1 of the Gilchrist patent, the construction being very closely resembling to it and in some cases identical. The parts operate in the same way and they secure the same results."

(*Transcript of Testimony, pages* 172 *and* 173.)

UPON CROSS EXAMINATION:

The pin does not connect directly with the chamber as specified in the Gilchrist patent, but is connected indirectly; the oil feeds automatically to the bearing in a manner that is identical to that in Gilchrist; the Labadie patent specifies two chambers. The oil flows from the large chamber into the small chamber only when the trolley is pulled down at the end of the line, at which time it is presumed that a sufficient quantity of oil will flow into the smaller

chamber to supply the trolley well for the ensuing trip; I don't say that this is a suitable combination for a logging block; I said that I found all the elements of the Gilchrist patent in the Labadie device;

"Q. Well, the bearing pin terminally mounted in the sides does not penetrate the wall of the oil chamber, does it?

"A. It has a direct connection with it.

"Q. That is an additional element then; it doesn't connect directly with the oil reservoir?

"A. Well, yes, that opening e is an extension of the chamber E. There is nothing to restrain the flow of oil between the two.

"Q. How many oil chambers has that combination got?

"A. There are two oil chambers in each side.

"Q. And the pin connecting directly with either of them?

"A. Yes, through the bore e.

"Q. Through an additional duct then?

"A. Well, that is nothing but an extension of the other chamber.

"Q. That is all; that is an additional element?

"A. No, I wouldn't say an additional element by any means. It is an extension of the oil chamber.

"Q. There are three oil chambers; that is the point I want to bring out.

(*Transcript of Testimony, pages* 174-5.)

UPON RE-DIRECT EXAMINATION:

Referring to page 2 of the specifications of the Labadie patent, lines 4 to 8 inclusive, I find that the construction resembles even more closely the Gilcrist construction, in the construction there provided for the use of a single oil chamber in each side.

In the Tousley patent No. 520,973 the oil reservoir is in the wheel instead of in the sides; side pieces of the frame are shown as slightly cupped and fitting snugly over the bosses or central hubs of the well in a manner which very closely resembles that shown in the Mallory sheaves.

UPON CROSS EXAMINATION:

In the Tousley patent there is no interior oil chamber nor axial opening in the pin; the pin is screwed into the side by threading in exactly the form of the Gilchrist and others.

UPON RE-DIRECT EXAMINATION:

In the Bouse patent No. 644,729, the oil reservoir is in the pin connected with the surface of the pin by radial bores; the pin is shouldered and threads into the sides, the sheave turns on the pin and the piston with a spring forces the lubrication to the bearing.

UPON CROSS EXAMINATION:

The Bouse block contains no interior reservoir in the cheek or side of the pulley unless you consider the pin an extension of the cheek, and I would hardly say that.

UPON RE-DIRECT EXAMINATION:

The Barnhart and King patent No. 756,790, is of a construction closely resembling the Bouse block last described.

The pertinence of Lindsay Patent No. 847,955 seems to be limited to the construction of the pin, which is shouldered at each end and threaded to screw into the sides; the oil reservoir of the sort designed in Gilchrist's claim 1 is not to be found in the Lindsay patent; there is an oil duct or channel which is of limited capacity in the sides communicating with the pin, which is an interior oil chamber of very limited capacity.

UPON CROSS EXAMINATION:

The function of this duct is to conduct the oil from the oil can to the end of the pin sheave.

UPON RE-DIRECT EXAMINATION:

Lockfaw patent No. 964,284 has an oil chamber in each side and has all the elements of claim 1 of the Gilchrist patent, combined in the same way with constructions which are equivalent from a mechanical standpoint to operate in the same way and secure the same result; changing the proportion of the elements of the claim is the privilege of the patentee at any time without departing from the protection given by the claims.

UPON CROSS EXAMINATION:

Whether the Lockfaw reservoir was designed to hold oil, it will accomplish that purpose, the size of the reservoir being only a question of degree; the purpose without doubt was to provide a storage capacity enough to supply oil for some little time."

UPON RE-DIRECT EXAMINATION:

"Q. Now, will you compare claim 4 with the Morgan patent and state which of the elements of claim 4 are met by the Morgan patent?

"A. Well, the first element, namely, the parallel sides are found in the Morgan patent. So far as the annular recesses in their adjacent faces, they are not found in the Morgan patent. The inner faces—

"Q. Now, before proceeding further, Mr. Reynolds, and taking up the annular recesses in the sides: In view of the previous condition of the art as shown by the exhibits and files here, what would you say as to the date of the earliest annular recesses in the sides?

MR. CARY: One minute—he is taking them up separately; this is a combination claim; we have already admitted that is old.

COURT: You have admitted pulleys were made prior to the patent.

MR. CARY: He should take the picture of the whole combination which is a separate and patentable thing.

COURT: If it involves invention.

MR. McCARTHY: The question is, whether it is a combination or an aggregation; if it is a mere aggregation, why, it is not entitled to the dignity of a patent.

MR. CARY: Good enough for him to copy, and copy extensively.

MR. McCARTHY: I think that should be stricken from the records.

COURT: I think it should be stricken; he had a right to copy it if it was not patentable.

MR. McCARTHY: Now, probably we can save time by going through these different elements and seeing how far these are admitted again.

MR. CARY: I think you had better proceed with the examination.

MR. McCARTHY: I might be able to shorten it; are you will to admit that pulley blocks consisting of parallel sides having annular recesses in their adjacent faces are old?

MR. CARY: We admit that.

MR. McCARTHY: Existed in the prior art prior to the application of Gilchrist; and in view of the Morgan patent, what will you say with reference to the block having a chamber with an inlet adjacent to the top?

MR. CARY: Let him compare the Morgan patent and the Gilchrist claim.

MR. McCARTHY: You said you admitted some of this; I wanted to see if you admitted it all.

MR. PECK: We haven't admitted the oil chamber is old in the art.

MR. McCARTHY: Not even now.

MR. PECK: No, sir; absolutely not.

"Q. I will ask you then to proceed with the comparison, Mr. Reynolds.

"A. As I have said, the Morgan patent does not have the recesses in the sides of the faces similar to the recesses that are named in claim 4 of the Gilchrist. It does have, however, the next element, which is one of the sides being provided with an interior oil chamber, and this oil chamber has an inlet adjacent to the top of the block. It also has the next element, a bearing pin terminally threaded to engage the sides in the recessed portion thereof. This pin also has an axial opening communicating with the chamber and extending through the side wall of the pin. There is also the next element, namely, a sheave journaled for rotation upon the pin, and having oppositely disposed bosses. However, they do not fit anti-frictionally in the recesses, because there are no recesses there. The pin, however, has shoulders to engage the sides to prevent the same from binding upon the sheave. It does have a top removably connecting the sides above the sheave.

"Q. By referring to the specifications of the Gilchrist patent, what do the specifications indicate are the purposes of the annular recesses in the sides? And the sheave with the hubs fitting closely, but anti-frictionally therein? With shoulders on?

"A. To keep dirt and dust away from the bearings.

"Q. I will now call your attention to the Morgan patent, and direct your attention especially to the

washer and felt shown upon the axle of the Morgan patent?

"A. There is a ring of felt which is retained by a washer at each side of the sheave; the purpose of this is to hold the oil in and prevent the dirt from getting in.

"Q. Does that act for the same,—perform the same function as shoulders in the Gilchrist patent?

"A. Its purpose is the same and it acts in the same manner. The appearance of the construction, however, is a little different.

"Q. And it is provided with means to prevent the binding of the sides upon the sheaves, is it not?

"A. Yes, one end of the pin is threaded and screws into one of the sides. The other end of the pin is provided with a head making of it a bolt. This head is outside of the other side. It is, however, secured against movement lengthwise of the pin, which is the function of the threading and shouldering of the other pin, by means of cap D, which is secured over the head and binds down upon it thus preventing movement of the pin lengthwise of itself, and preventing the two sides of the sheave from moving towards each other.

"Q. Does this form the mechanical equivalent of the thread and shoulder on the pin in the Gilchrist patent?

"A. I would say it formed a full mechanical equivalent. It was common in this art to provide pins of this character with a shoulder and a nut on

the outside so as to clamp the sides between the nut and the shoulder. Another equivalent.

"Q. And in the Morgan patent, has it a top removably connected with the sides?

"A. It has a top but the connection with the sides in the Morgan patent does not contemplate ready removal or disconnection. In other words, it is by a rivet instead of by a pin which is easily removable.

"Q. Does the matter of a top removably connected with the sides in any way affect the function of the oil chamber or the communication of the oil to the axle?

"A. The function of the top being removable is something which is entirely foreign to the function of lubricating the sheave, in other words, there is absolutely no connection between the two, of such a manner as is considered in the patent. In other words, the lubricating mechanism described might be used with or without the top, or with a top whether easily disconnected or fixed. And similarly, a top can be used of that type whether or not any lubrication or whatever kind of lubrication. In other words, I would say that claim was an aggregation and not a combination."

(*Transcript of Testimony, pages* 184-9.)

UPON CROSS EXAMINATION:

The Morgan patent has the equivalent of a bearing pin terminally threaded at both ends; strictly speaking, the pin of the Morgan patent has no shoul-

ders, but it has threads which are in themselves shoulders; the only shoulder of a Morgan pin is the shoulder formed by the threads; such shoulder performs the same function as the shoulder of the Gilchrist claim; there is no shoulder on the Morgan pin except the shoulder formed by the threads, which is the mechanical equivalent of the Gilchrist shoulder; the Morgan patent has no hinge connecting the top such as is described in the Gilchrist construction.

UPON RE-DIRECT EXAMINATION:

I see no connection whatever between the flow of oil and the top of the sheave, nor between the flow of oil and the shoulder on the axial pin, nor between the flow of oil and the annular recesses of the sides of the block.

Labadie patent No. 513,067 contains all the elements of claim 4 of Gilchrist No. 977,613, except the removable top.

UPON CROSS EXAMINATION:

The annular recesses specified in claim 4 Gilchrist are formed in the Labadie patent by the flanges "m," which extend at right angles outwardly from the inner wall of the side; the recess of the Labadie and Gilchrist patents are identical in function and purpose; the Labadie recess does not enable one to get a longer hub nor do I regard that the recess of the Gilchrist patent enables one to make any longer hub or any longer pin; the removable top of the Labadie patent is the collar "C" which connects the shanks

or ends of the sides and is not the same construction as Gilchrist, but it does connect the sides together and forms the means by which the device as a whole is connected with the object by which it is supported. The top "C" of Labadie serves to hold the two sides in fixed relation to each other, and I don't suppose it would be pratical to use that construction in a logging block—it would have to be designed differently.

UPON RE-DIRECT EXAMINATION:

Patent No. 115,248 issued to Henry Smith, May 23, 1871, specifies a pulley block consisting of sides with an oil reservoir in a sheave, bearing pin terminally mounted in the sides, a solid pin and a sheave journaled for rotation upon the pin.

UPON CROSS EXAMINATION:

There is no interior oil chamber in the side nor axial opening in the pin communicating with the chamber.

UPON RE-DIRECT EXAMINATION:

Patent No. 390,341, issued to A. E. Brown October 2, 1888, shows the development of the art of lubricating the pin and of protecting it from dirt. It has an oil reservoir located in the sides of the pin in a position co-axial with the axis, outside of the ends of the pin in the shell forming the side of the sheave; the pin is not bored for oil passages.

UPON CROSS EXAMINATION:

The oil chamber is in a part of the sheave, in the hub part; the reservoir is a grease cup in which oil could be used; the pin has no axial opening for a passage of grease or oil.

UPON RE-DIRECT EXAMINATION:

The Bouse patent No. 644,729 meets the elements of claim 1 of Gilchrist, except that the oil reservoir is not in the side but is in the enlarged axial bore of the pin.

UPON CROSS EXAMINATION:

The Bouse pin has shoulders and threads the same as the Gilchrist, and is different only that the central axial bore has been enlarged for use as a reservoir.

UPON DIRECT EXAMINATION:

The Gilchrist patent No. 765,475, issued to the complainant in 1904, has an oil reservoir and a sheave; meets the elements of claim 1 of Gilchrist No. 977,-613 as to the shouldered pin, as to parallel sides and as to a sheave journaled for rotation upon the pin between the sides.

UPON CROSS EXAMINATION:

I don't consider that Gilchrist No. 765,475 of 1904 meets fully the terms of the claims as a combination of Gilchrist No. 977,613.

UPON RE-DIRECT EXAMINATION:

The patent to Gilley No. 780,280 is a slightly different type of construction; it discloses oil reservoirs or chambers in each of the sides; the opening of the Gilley chamber is at the upper side of the chamber; the Gilley chamber is shown as being either integral with or attached to the side, the bearing pins being terminally mounted in the side; the bearing pin has no axial opening communicating with the chamber; the Gilley patent shows the attached chamber and the integral chamber as being interchangeable and equivalent in construction.

Looking at the patent drawings of Gilchrist No. 977,613, the oil chamber is shown to project beyond the plane of the natural side; looking at complainant's Exhibit "A," the oil chamber appears to be exterior to the plane of the sides; looking at the ribbed section of Complainant's Exhibit 8, it shows two projecting flanges, which if covered by a plate would result in an oil chamber; that plate might be an attached plate as shown in Morgan or it might be formed in the making of casting and if the depth of it was not considered sufficient as it is now, it would be an easy matter to make variations at the sides projecting a little bit more.

Changes in dimension do not amount to an invention; considering line 58 of Gilchrist No. 977,613, would indicate that the construction has been added to the side in order to get space to form a chamber; any mechanic having a block provided with an elbow

grease cup or a block of that kind having an extension which has been referred to as the stove-pipe form, and also a block having the side constructed in accordance with the side of the Gilchrist block just referred to which does not contain the oil reservoir, should be able to devise the type of oil reservoir which has been used and shown by Gilchrist in patent No. 977,613. In other words, the provision of the particular type of construction of oil reservoir shown in this patent is nothing more nor less than mechanical skill in view of the prior art as shown by previous blocks; in fact, the skill required for that would be only ordinary.

UPON CROSS EXAMINATION:

The Gilley patent has no axial opening in the pin and therefore does not with exactness cover all of the elements of claim 1 of Gilchrist; the Gilley oil chamber is the same as the Gilchrist chamber, except that it has not been extended up quite so far and is not closed at the top; nor does the sheave rotate on a pin in the Gilley patent.

"Q. Prior to this case were you familiar with logging equipment and logging blocks? * * *

"A. To a certain extent, yes; for several years while in New York City I had all the patent application work for the Lidgerwood Manufacturing Company and a part of that was in connection with this sort of construction. Also this particular matter of these two Gilchrist patents was called to my attention in connection with the question of infringement

some time ago. I had an investigation made and wrote a report covering the question of infringement, which report was dated April 14, 1919, and it is this report which I now have in my hnd. This was done, not for Mr. Mallory, but for a Seattle firm.

"Q. Yes, several have been getting reports—asking for reports. Whom did you make this report for?

MR. McCARTHY: I object to that; this man does not need to find out what is going on with other people here in this trial.

MR. PECK: May it please the court, we have a right to show this man's interest in the case. This man has been on the stand arguing the case from the time he first went on. We have a right to show he is a retained attorney on behalf of some other parties.

MR. McCARTHY: You can ask the question whether he is a retained attorney if you want to, but you don't need to ask for whom he made the report.

COURT: He can answer the question.

"A. Washington Iron Works.

"Q. The Washington Iron Works manufacture logging blocks?

"A. I believe so.

"Q. Did they ever receive a notice that Gilchrist—

MR. McCARTHY: Objected to as incompetent, irrelevant and immaterial.

"A. I can't state as to that.

COURT: I don't think that is material. It is material to ascertain what connection this witness had with this patent, whether he is here as an absolutely fair and unbiased expert, or

whether he has been retained before by somebody else.

MR. McCARTHY: If your Honor please, the notice sent to the Washington Iron Works and he said he made an investigation for them in regard to this patent.

COURT: I know he said that but there is no evidence why he did.

MR. McCARTHY: No evidence here any notice was sent to the Washington Iron Works. If there is any evidence about it, it is nothing more than the statement of counsel.

"Q. The Washington Iron Works asked you to look up this Gilchrist patent and report on its validity?

"A. Report on whether or not certain constructions were infringements.

"Q. And when you took the stand, of course you had prior conviction as to the validity of this patent?

"A. Whatever conviction I had in the matter was based entirely upon the prior art of which I had knowledge, and was not influenced in any kind of way by any other consideration.

"Q. Wasn't it in the interest of the Washington Iron Works to show that the Gilchrist patent was invalid?

"A. Well, I don't know that I am competent to say as to that. It might have been and it might not.

"Q. They manufacture pulley blocks, don't they, of the same type?

"A. I don't know as to that.

"Q. Did you ever see the block the Washington Iron Works puts out—makes or manufactures?

"A. I don't know that I have ever seen a block put out by the Washington Iron Works. I think possibly I may. I know this, that I have never gone to the plant of the Washington Iron Works to see any block nor have I gone to any other place to see any blocks as having been made by the Washington Iron Works.

"Q. Did you ever go to the Puget Sound Iron & Steel Works to look at the patterns of the Gilchrist block?

"A. No, never did.

"Q. A couple of years ago?

"A. No, never did. I was simply furnished with a sketch and asked to base my search and render an opinion upon that, and that is what was used, and that alone.

"Q. The information that you gather here now will be of great interest and value to your client, the Washington Iron Works, won't it? ?

"A. I don't know as to that; I don't know whether they are making such a block as that or not.

MR. PECK: May it please the court, in order to keep the record straight, I want to offer to show that at the same time that we served notice upon the Mallory Company in preparation for this suit, we also served notice upon the Washington Iron Works, and it was pursuant to that notice that witness was employed to make search.

MR. McCARTHY: It is incompetent and irrelevant and ought not to be in the record at all.

COURT: I don't think that is material."

(*Transcript of Testimony, pages* 227, 228, 229 *and* 230.)

Have had no practical experience with the use of logging blocks, except possibly a few times when I have been about logging camps; have never designed any logging blocks; have never taken out any patents nor made any drawings of logging blocks; as a single patent the best reference meeting claim 1 is the Morgan British Patent No. 712—1893.

UPON RE-DIRECT EXAMINATION:

Kjelgaard British Patent No. 5657—1896, has not all the elements of claim 1 of the Gilchrist patent.

British Patent Dyne No. 41,927—1901, meets all the specifications of claim 1 of the Gilchrist patent.

UPON CROSS EXAMINATION:

The oil chamber is attached to the sides in the Dyne patent the same as in the Morgan patent; I would not care to discuss the practicability of the Dyne patent, that appears for itself.

UPON RE-DIRECT EXAMINATION:

I consider the Morgan reservoir as the absolute mechanical equivalent of the Gilchrist reservoir.

Referring to Gilchrist patent No. 765,475, a removable top, a pin terminally mounted in the sides, a shouldered pin to engage the sides, a lubricating de-

vice whereby lubrication is conducted to the pin, are shown.

UPON CROSS EXAMINATION:

All of the elements of claim 4 of Gilchrist No. 977,613 are not shown in the prior Gilchrist patent No. 765,475; there is no interior oil chamber in the side, nor does the pin have an axial opening communicating with the oil chamber, nor are there recesses in the sides nor bosses on the sheave.

UPON RE-DIRECT EXAMINATION:

Referring to Defendant's Exhibit "M," I find a block with two parallel sides having bosses located outwardly which gives the block a long bearing and a long pin; this block also shows a dust guard or protection of exactly the same character as that shown in the Gilchrist patent; also is shown a removable top; also a bearing pin containing an oil reservoir formed by drilling through the pin with a cross bore from the axial bore to the outer surface of the pin; also a pin terminally mounted in the side with a dust cap projecting over the hub.

UPON CROSS EXAMINATION:

There is no oil chamber in the side.

UPON RE-DIRECT EXAMINATION:

I find in Barnhart and King patent No. 786,790 a pulley block consisting of parallel sides; these sides have no interior oil chamber; it does have a bearing pin terminally threaded to engage the sides in the

recess portions thereof; the sides have recesses similar to the recesses shown in the Gilchrist patent; the pin has an axial opening with a cross bore communicating with the surface of the pin; it also has a sheave journaled for rotation upon the pin with oppositely disposed bosses attached to fit closely but antifrictionally into the recesses; the pin has shoulders engaging the sides to prevent the same from binding the sheave; the block has a top removably connecting the sides above the sheave. The point of diversion from Gilchrist claim 4 and this patent is the location of the oil reservoir which is within the axial bore instead of in the side itself.

UPON CROSS EXAMINATION:

The top of the Barnhart and King block is not hinged in the same way as the Gilchrist top and is not the same identical structure. In order to put the cable in the block, one would have to take the block down or thread the cable through it, while in the Gilchrist block one could take the pin out at one end and let it swing on the other; I do find all the elements in claim 4 of Gilchrist 977,613 in the Barnhart and King Patent 786,790, except the difference as to the oil reservoir.

UPON RE-DIRECT EXAMINATION:

The Opsal patent No. 806,562 contains all the elements of claim 4 of Gilchrist No. 977,613, except the annular recesses in the sides, the interior oil chamber, and a bearing pin terminally mounted in the

sides. In the Opsal patent No. 845,041 I find that the oil arrangement is different than that of Gilchrist in that the Opsal oil chamber is formed in the sleeve or bushing placed in the sheave.

UPON CROSS EXAMINATION:

I do not find all the elements of claim 4 in the Gilchrist patent No. 977,613 in the prior patent to Opsal No. 845,041.

UPON RE-DIRECT EXAMINATION:

In the Hammond patent No. 876,176 I find all of the elements of claim 4 of the Gilchrist patent excepting the feature of placing the oil reservoir in the side of the plates; in view of the oil chamber of the Morgan and Ludford patents it does not appear to me that the addition or change in the Gilchrist patent from the Hammond patent would be such as would involve a new or patentable combination; the placing of an oil reservoir in this way has been shown in the art to be old and the thought of the need for more oil would lead any person familiar with the art to so place a reservoir.

UPON CROSS EXAMINATION:

The Hammond patent No. 876,176 does not disclose all of the elements of the Gilchrist patent No. 977,613.

"Q. To your knowledge there never has been, has there, a combination showing all of the elements of claim No. 4 of Gilchrist, as you have studied the prior

art? Can you point to any patent that shows all of the elements of claim 4? Yes or no.

"A. No. I expect in exact details it has not, but there is that slight difference, such as referred to in connection with the Hammond patent."

(*Transcript of Testimony, page* 251.)

UPON RE-DIRECT EXAMINATION:

The removability of the top as specified in claim 4 of Gilchrist in no way affects the functions of the other elements; if the two sides were made as one integral piece all the other parts would function in the same identical way and obtain the same result and have the same relation.

UPON CROSS EXAMINATION:

If the top were in one piece with the sides, the cable would have to be threaded in, the hinged top has the useful purpose of making the block more convenient and the more practical block for logging purposes, but I don't consider that the removable top affects the functioning of the major part of the elements of the claim; it affects the function of other parts.

UPON RE-DIRECT EXAMINATION:

In the Lockfaw patent No. 964,284 I find all the elements of claim 4 of Gilchrist, except the annular recesses, oppositely disposed bosses on the sheave, and a lack of terminal threading of the bearing pin.

UPON CROSS EXAMINATION:

The top of the Lockfaw block is not hingedly connected as in Gilchrist and a cable would have to be put in either by threading or by removing the head; I do not find all the elements of claim 4 of Gilchrist patent No. 977,613 in the Lockfaw disclosure No. 964,284.

UPON RE-DIRECT EXAMINATION:

In Davis No. 973,177 I find all the elements of Gilchrist patent No. 977,613, except the interior oil chamber in the side, and whatever variation is caused by the fact that the Davis top is made integral with the sides.

UPON CROSS EXAMINATION:

I do not find all the elements of claim 4 of Gilchrist No. 977,613 in the disclosure of Davis and McCredie No. 973,177, the oil reservoirs in the side walls and the removable top being absent.

TESTIMONY OF A. M. CLARK, called as a witness on behalf of the defendant.

My occupation, Northwest Manager of the Columbia Steel Company's plant in Portland, Oregon, since 1904, the Columbia Steel Company being the successor of the Columbia Engineering Works since 1910. The first block constructed under my supervision was the Opsal block shown in Defendant's Exhibit "I"; the annular recess in the side was a part of the casting and the hubs of the sheave extended so as to

fit closely in the recesses, resulting in what we termed a long hub and a long bearing; the block had a removable head or top by taking out a pin; these blocks were manufactured just after I came to the company, probably in 1905; the pin was shouldered and the ends of the pin were threaded and screwed into each side; the plug in the end of the pin shows the oil reservoir, which was the usual practice in making various blocks as long as I can remember; there was also an opening threaded through the pin to permit the oil to get through the pin into the sheave.

We also manufactured the Skookum block shown by Defendant's Exhibit "M," and is the same block which was shown in our catalogues.

Referring to Defendant's Exhibit "GG" the shackle or goose neck at the top was removably connected; the block sides had annular recesses into which the long bearing or the hub projected and fitted; the pins had an axial bore with a cross bore to the bearing surface, were terminally mounted in the sides, and were shouldered; caps were over the end of the pin as a dust or dirt-proof feature; lubrication was furnished the pin from the inside of the pin by a grease cup or oil cup located on the outside of the block in connection with the pin itself; this block was manufactured and placed upon the market at the time of the advertisement; the advertising cut was made from the block and then the blocks were put upon the market; the blocks shown on page 5 of Defendant's Exhibit "B" appear to be identical with the Opsal

block, which we manufactured and sold to Mr. Mallory who handled the same.

We made the block shown on page 8 of Defendant's Exhibit "B" and handled by Mr. Mallory. The imprint on the block indicates "Patent date December 5, 1905"; the block had a long bearing and a removable top, grease cup oiling system through an axial bore of the pin cross-bored to the surface, annular recesses in the sides, and long hub sheaves; this was the second block we made, the first one with a short hub, and was manufactured in 1905; the block had a shouldered pin, threaded pins which were fastened to the block side with a nut.

Referring to figure 100 at the bottom of page 10 of Defendant's Exhibit "B," I would say that this block was manufactured prior to the issuance of the catalogue in 1907, the cut being made from the block; the block had a removable top, long hub bearing annular recesses in the sides, hubs fitting into the recesses, shouldered pin and lubrication from an oil or grease chamber on the outside through an axial hole in the pin with a cross bore to the surface; the deep ribs shown on this block was a common form of construction, it being the idea to make the block as light as possible and still get the necessary strength along the center in these ribs; if one wished to make an oil well integral with the side of the block the most natural thing to do would be to extend a portion of the side sufficiently to allow for an oil cup or an oil reservoir to be put on it sufficiently large

to perform the work which that particular side was to be used for; that could be done, and the easiest way to do it is to put an extension on the side, and core that side out; in other words make a recess in the side of the boss to hold the oil or grease.

UPON CROSS EXAMINATION:

No one of the blocks which I have been describing has an interior oil chamber in the side; they have all been what is known as grease cup or compound blocks, wherein the grease was forced by tightening up the oil cup; the object of the annular recesses is to give a longer, better bearing, a greater bearing area on the pin; the main object of the long pin is to keep it from running hot, to give it a better bearing surface; whether you have a small or large area of bearing surface you need lubrication; many conditions govern the width of the sheave; if you use a small, narrow sheave and spread the sides far apart, the sheave would slop back and forth on the pin and the cable would be liable to bump off and lodge in between the side of the sheave and the side of the pulley block; the design of a sheave has really been evolved as logging increased and as they are using larger engines, larger pins and larger block sides, then larger sheaves have to be used. The first block sides took a 9-inch sheave, while today, due to different methods of logging, sheaves run up to 42 inches, and the size of the pin, the length of the pin and the bearing are made proportionate to the sheave

to withstand the work; the hub of the sheave is made longer than the width of the sheave; there are a number of factors that govern the width of a sheave; a removable top is one that can be taken off, either by withdrawing the pin or by the use of a monkey wrench to remove nuts; if the top were cast as a part of the side, it would not be removable; my definition of that would be, "any head which could be taken off with a hammer or chisel would be removable." To equip Exhibit "I" with the Gilchrist oil chamber rather than with the grease cup oiling device would cost a litttle bit more because the block would be heavier; on the other hand, you would be doing away with the grease cup, but your oil side would cost a little bit more; because of additional metal to form the outside of the oil cup an oil chamber side would be a little heavier than the side without an oil chamber.

The oil chamber construction tends to strengthen the side of the block; have never seen a modern logging block that you had to use a monkey wrench to take the top off, and in order to make a salable block, I imagine that there would have to be some method provided to put the cable into the block; all the castings which we make for block sides provide for a hinged top.

I have financial and business relations with F. B. Mallory Company; I enjoy the business of F. B. Mallory, the Willapa Harbor Iron Works and practically all the other block makers in this territory; I was requested by Mr. Mallory to testify; the

moulding of a block side with an oil chamber would increase the cost of the block from 3 per cent to 5 per cent over the cost of a block with plain sides.

UPON RE-DIRECT EXAMINATION:

The tops of all the blocks which I have referred to in my testimony work with a hinge and pin, so that the shackle, or top, as you call it, can be turned back by the removal of the pin with the fingers.

TESTIMONY OF EDWIN L. TAYLOR, called as a witness on behalf of the defendant.

My occupation is blacksmithing since 1903 in Portland, making all kinds of logging blocks for the past 14 years; have made logging blocks for myself, F. B. Mallory; Hammond Manufacturing Company and other contractors and loggers; was making logging blocks for F. B. Mallory in 1907, and in that year manufactured the blocks shown on page 1 of Defendant's Exhibit "B"; the pin was a two to two and one-quarter inch pin; brass bush sheave; one end of the pin was turned round and the other end turned with a square shoulder and thread for a nut; the oiling device was by way of a grease cup on the end of the pin feeding through an axial hole in the pin, connected by a cross bore to the surface of the pin; sometimes an elbow is used as shown in Defendant's Exhibit "C"; the top would open back removing the cotter in the pin; sometimes we would put on a larger elbow for greater oil storage; the pin was shouldered.

In 1907 I also manufactured for Mr. Mallory a yarding block as figure 60 in the upper left-hand corner of page 3 of Defendant's Exhibit "B"; the pin was threaded on each end and screwed into the side; the pin was shouldered; lubrication was through a hole drilled through the center of the pin longitudinally with a cross-bore to the surface; the reservoir was a fairly large hole, about a half-inch hole with a pipe thread and a plug in the end; the top was a large cross-head with a pin that was removable; one could tip the head back and drop the cable in.

In the year 1907 I manufactured the Geary Yarding block as shown by figure 85 on page 6 of Defendant's Exhibit "B"; Defendant's Exhibit "3-R" is a side of one of the Geary Yarding blocks just referred to; the pins were screwed into the sides; the block had annular recesses in the sides with oppositely disposed bosses on the hub to fit into the recesses and extend into them; lubrication was by a hole drilled in the end of the pin to the center and from the center out to lubricate the bushes.

Geary block side introduced in evidence and marked "Defendant's Exhibit 3-R."

The pin was shouldered, the top was removable, having a rivet on one side, and on the other side there was a link to drop over the lug, on what we call the top side. To remove, just put it back and put in the cable.

In 1907 I manufactured for Mr. Mallory the tripline block shown as figure 88 on page 7 of Defend-

ant's Exhibit "B"; lubrication was by an elbow with a hole drilled through the pin from the side so as to lubricate the bushings; the pin was provided with shoulders fitting up against the sides; the top was removable just the same as the other block.

Defendant's Exhibit "3-S" for identification is a cross-head hook for a yarding block represented in figure 60 on page 3 of Defendant's Exhibit "B."

Said cross-head hook introduced in evidence and marked "Defendant's Exhibit 3-S."

Defendant's Exhibit "3-T" for identification is a yoke for a yarding block; this style of yoke was made as early as 1907.

Said yoke introduced in evidence and marked "Defendant's Exhibit 3-T."

This yoke would be called a shackle or the yoke of the block and was removably disconnected by pulling a pin out of one side and tipping it back.

Defendant's Exhibit "3-U," for identification, is a pin used in yarding blocks of the style made in 1907.

Said pin introduced in evidence and marked "Defendant's Exhibit 3-U."

Defendant's Exhibit "3-U" was a short pin; long pins for long bearings were also made at the same time.

Defendant's Exhibit "3-V" for identification is a pin for a Tommy Moore or moving block which has a bearing a very little wider than the sheave; pins

of this character have been made since 1905 or 1906, positively as far back as 1907.

Said pin introduced in evidence and marked "Defendant's Exhibit 3-V."

UPON CROSS EXAMINATION:

No one of the blocks concerning which I have been testifying had an oil reservoir or chamber in the cheek or side of the block.

Stipulated that the Complainant is the owner of the Willapa Harbor Iron Works.

TESTIMONY OF A. M. CLARK, recalled as a witness on behalf of the defendant.

MR. M'CARTHY: I will just ask one question; are your relations with the Willapa Harbor Iron Works—are you at the present time —do you have business relations with them, or manufacture articles for them?

"A. Yes.

MR. PECK: What do you manufacture?

"A. Block parts.

"Q. To what extent?

"A. I think we are doing all of the sheave business.

MR. PECK: How is your volume of business with the Willapa Harbor Iron Works compared with the volume of business for Mallory?

MR. M'CARTHY: I object as incompetent, irrelevant and immaterial.

COURT: I think he might answer that question since they have made some importance of it.

"A. I believe we are getting all of the Willapa Harbor Company's sheave work, at least, and we are doing a great deal of their side work at the present time.

MR. PECK: You misunderstood the question, Mr. Clark. I asked about the volume of business. How does the volume of business you are doing with one concern compare with the volume of business you are doing for the other concern? You are doing a great deal more for Mallory than you are for Gilchrist, aren't you?

"A. Very much more; very much more.

(*Transcript of Testimony, page* 286.)

TESTIMONY OF J. J. GEARY, recalled as a witness on behalf of the defendant.

I have had practical experience as a logger since 1888, and so far as I know all logging blocks have been provided with removable tops.

UPON CROSS EXAMINATION:

"Q. What do you mean by removable top?

"A. Can be taken apart, opened up so you can put the cable in or taken off to be repaired."

(*Transcript of Testimony, page* 287.)

TESTIMONY OF HENRY L. REYNOLDS, recalled as a witness on behalf of the defendant.

Comparing claims 4 and 5 of Gilchrist No. 977,613, I find them to be practically the same with a slightly different arrangement of words, except that claim 5 has no expression referring to the annular recesses in the adjacent faces of the block side nor as to the

pin having shoulders; the word "communicating" as used in mechanical expression means "having communication with," and does not necessarily mean "opening into"; where the flow of oil is being considered, it would apply to any form of communication by which the oil could pass from one to another; referring to Defendant's Exhibit "DD," the term would cover the flow of oil with just as much aptness as if the chamber were placed immediately at and in direct communication with the end of the pin; the specifications in claim 4 as to the pin having shoulders to engage the sides to prevent the same from binding upon the sheave would apply to the shoulders as shown in the pin in Labadie No. 513,067, and also to Defendant's Exhibit "3-U"; claim 5 is apparently an effort to have a construction broad enough to apply to pins threaded and without shoulders, which is the construction of the pin in the Morgan patent; referring to that part of claim 5, page 6, "a top having spaced lugs between which the projections of the side are adapted to fit," I find this specification met in Defendant's Exhibit "3-T," and if we were to apply the broader construction as used in the other claims of a removable top, defendant's Exhibit "3-S" would meet this element of the claim; the shackle on Defendant's Exhibit "GG" is a removable top; the top of the butt chain lead block on page 1 of Defendant's Exhibit "B" meets the requirements of a removable top, also the figure 60 on page 3 of Defendant's Exhibit "B" meets the provision of a removable top; Exhibit "3-R" meets the

provisions of the claim with reference to annular recesses in the side of the block, and the threaded openings in the side of this Exhibit meet the claim in that respect; Defendant's Exhibit "3-U" meets the requirements of the claim as to a shouldered pin, the axial bore of the pin and the openings in the side of the pin, and conforms exactly to the terms of the claim, being used for like purposes to obtain like results. I find all of the elements of claims 1, 4 and 5 of the Gilchrist patent No. 977,613 represented in the prior art prior to the date of the filing of the Gilchrist patent.

UPON CROSS EXAMINATION:

"Q. Do you find all of the elements united in any one patent or exhibit or prior publication that has been submitted to you, which cover the claims 1, 4 and 5 of the Gilchrist patent?

"A. Excepting that possibly in some minor thing—

MR. CARY: Am I not entitled to a direct answer? He gives it to his attorney, do you or do you not?

COURT: Yes.

"A. I can't say that I find them all shown in exactly the same relationship in any one patent.

MR. CARY: That is all.

MR. M'CARTHY: That is all the examination you wish to make on that?

MR. CARY: That is all; if he can't find it, that is all."

(*Testimony, Transcript of, page* 292.)

UPON RE-DIRECT EXAMINATION:

Claims 1 and 2 of patent No. 1,063,528, issued to J. E. Gilchrist June 3, 1913, are for a pulley of the same general type and character we have been discussing but are drawn to cover a combination which includes a member which is placed between the ears of opposite plates, by which the shackle is connected thereto, and forms the spacer between the two sides and as well a guard to guard the rope or cable which spaces over the sheave; the shape of this particular member is well shown in perspective on figure 4.

Referring to figure 3 in the drawings of the first Gilchrist patent, this figure does not properly show what is described in the claim, but is very deceptive.

"If the court will refer to the line which divides the ear 7 and the central ear 6 you will find that these lines at each side extend entirely across which would seem to indicate that the two ears 7 at one side of the pin 6 are one single piece which extend across there, and have no connection with the central portion which is lettered 8. That is not the construction which is described in the patent nor is it the construction which has been referred to herein by everybody so far as I am aware."

(*Transcript of Testimony, page* 294.)

Defendant's Exhibit "A" correctly represents the construction described in the patent.

The only difference between claims 1 and 2 of Gilchrist No. 1,063,528 is the omission in claim 2 of the explanatory statement "so that the member may be

partially withdrawn to free the shackle without freeing the guard"; the construction designed in claim 2 is one which might operate in the same way as the construction of claim 1, simply a matter of proper manipulation; Defendant's Exhibit "W" properly shows what is described in claims 1 and 2; the guard member tied into the sheave in Defendant's Exhibit "V" meets the description of this patent; in order to consider the connecting member between the spanners as being between the cheek plates, referring to Defendant's Exhibit "V," it would be necessary to consider the lugs at the top of the cheek plates as a part of the cheek plates; claims 1 and 2 of Gilchrist No. 1,063,528 are met by the specifications of the Littler patent No. 898,121. In the Gilchrist patent the grooved portion at the bottom of the guard is shown and incidentally described in the specifications, but is not claimed; in the guard attached to the Gilchrist block, Defendant's Exhibit "V," the connecting member between the two spanners cannot act as a guard because its surface is raised above the lower edges of the spanners, and the spanners are closer to the cable than the connecting member; the only members of the construction which can act as a guard are the two spanners; the cable would strike them before it struck the connecting member; these two spanners correspond with the compression links in the Littler patent; the connecting member of the guard on Defendant's Exhibit "V" is not placed as directly and accurately between the shackle and the sheave as is true of the connecting member of the

device shown in the Gilchrist patent; in the Littler patent the guard would be between the shackle and the sheave just as fully as it would be in the Gilchrist; the relative position of the guard member 12 in Gilchrist is very accurately shown in figure 2 of the Gilchrist drawing, which shows the upper surface of the guard member 12 as being below or substantially coincident in plane with the lower edge surface of the shackle; while in the device shown in Defendant's Exhibit "V" the lowermost portions of the spacing bar which serve as a guard are, if anything, a little above the lowermost portion of the shackle and the connecting bar, extending between the two side plates, is higher still.

The Gilchrist Logging Tools, admittedly the catalogue of the complainant, was introduced in evidence and marked "Defendant's Exhibit 3-W." Referring to cut in the Gilchrist catalogue on pages 14, 15, 16, 17, 18, 19, 26, 27, 28, 29, 30, 31, 38 and 40 with reference to guards, I can't be certain whether there is a cross-plate or not, excepting for that, however, they show identical with Defendant's Exhibit "V."

Admitted that the Gilchrist catalogue is a current catalogue. The guards shown in the Gilchrist catalogue appear to represent a device which as a whole in its shape resembles the capital letter "H"; I do not find a guard in this catalogue with alternately disposed ears such as are described in the patent and shown in the Defendant's Exhibit "W." On page 13 of the catalogue there is shown a block which has

a little suggestion of the Z shaped guard, where on one side there is shown what appears to be a washer, whether anything more than that cannot be told by the drawing. If there were such a device as the one you refer to, the corresponding member of the opposite side ought to show. Nothing of that sort shows, consequently, I can only assume it is not present.

UPON CROSS EXAMINATION:

In the Littler patent the spanners are called compression links and there is nothing said in the patent about a guard. The part No. 12 described in the Gilchrist patent is not found in the Littler patent, nor do I find any reference to that particular element in claims 1 and 2 of the Gilchrist patent. There is nothing in the Littler patent which corresponds to part No. 12 in the Gilchrist patent, but the spanners themselves of the Litttler patent constitute a guard extending between the cheek plates.

"Q. How many guards, if you call these compression links guards, how many guards in the Littler patent?

"A. There are two elements, each of which acts as a guard.

"Q. There are two guards? Adding two ears to the Gilchrist Z type and making an "H" form of it, does that change the function in any way?

"A. None whatever. I would suggest that unless some special function by the Z shape not secured by the other—I would say that the two are exactly equivalent."

(*Transcript of Testimony, page* 306.)

UPON DIRECT EXAMINATION:

No compression links were found in the Gilchrist patent but the member 12 fitting snugly between the two cheek plates acts as a compression member, I suppose. If the Z shape is used, the compression member 12 must fit snugly between the cheeks or the guard would form a very weak connection; in the Gilchrist patent the member 12 acts as a compression member, that is, as a spanner; the links of the Littler patent act in the same way. The elements of the Littler patent—lugs, ears and compression links—acting in conjunction, act in the same way and to the same end as the device shown in Defendant's Exhibit "V"; the only difference between the guard device shown in Exhibit "V" and the device in the Littler patent is that the two compression links shown by the Littler patent have been connected together so they could be handled as one; comparing the device as shown by Defendant's Exhibit "V" with claim 1 of the Littler patent, I would not hesitate at all in saying that the terms of this claim apply exactly upon the spacing devices used in the exhibit, and, therefore, if a device such as shown in exhibit had existed prior to the filing of this application and had been known of, it would undoubtedly have been considered an anticipation of it and sufficient grounds upon which to refuse to grant the patent. Defendant's Exhibit "V" is wholly within the Littler patent, the guard is spaced there and acts in exactly the same manner, performs the same function. The construction is the same, and the results secured

are the same; in Defendant's Exhibit "V" the resistance against the drawing in of the side acts wholly upon the pins; it is co-action of the lugs, pins and the spanners, and the connecting portion in between takes no portion of the load, which is also true of the devices shown on the Mallory blocks,—all of these blocks which have the H shaped guard, and that is not true of the device shown, described and claimed in the Gilchrist patent; in the Gilchrist patent it is highly improbable that the pins would take any of the compression load at all; apparently it was the intention under the Gilchrist patent to have the central portion of the element take all the compression without any compression on the ears at all; having in mind the prior Littler patent the compression member in the center of the Gilchrist device is the only element which presents any novelty whatever; no person with any knowledge of mechanics or the action of forces whould ever make a Z shaped design like that claimed in Gilchrist if they depended on conveying the compression strain on the ears and pins.

> COURT: "I think probably you have led this witness long enough; you have taken half an hour in putting answers in his mouth and have him say yes. He is an expert and ought to be able to explain these things himself."

If a device as shown in Defendant's Exhibit "V" had existed prior to the filing of the Littler application, it would undoubtedly have been considered an anticipation of the Litttler patent.

UPON CROSS EXAMINATION:

The links of the Littler patent are called compression links but they do serve as a guard between the shackle and the sheave and prevent the cable from getting up into the shackle but do not keep the cable from getting into the sides of the pulley block.

"Q. Now, you said yesterday that the function of the H was just the same as the Z in the Gilchrist block; that is so, isn't it?

"A. It performs the same function, a spacer, but connected between the sides and as a stop to prevent the cable from raising up into the shackle.

"Q. That is all; no use going over this time and again."

(*Transcript of Testimony, page* 314.)

UPON RE-DIRECT EXAMINATION:

"Q. Is there anything further in the prior art that you had in mind in these questions we have gone into?

"A. No; I don't think there is; I think everything has been pretty well gone over.

COURT: Mr. Reynolds, I understood you to say, you were a practicing lawyer in Seattle?

"A. Patent attorney.

COURT: Patent?

"A. Patent.

COURT: In active practice?

"A. Yes, registered before the United States Patent Office, have been since the requirement for registering.

COURT: As such attorney, are you interested in any litigation or probable litigation involving this Gilchrist patent?

"A. I have not been spoken to by anybody with reference to any litigation that is contemplated in the matter. I did, as I said before, make a report—

COURT: I know you said expert.

"A. As an expert, pass upon the question of infringement. Aside from that, that is the only thing that has had any connection with the Gilchrist patent.

"Q. In that connection, who was it requested you to pass upon that question?

"A. That matter was referred to me by an attorney in Seattle.

"Q. Was not by any direct employment of any company?

"A. No; it was by a practicing attorney in Seattle, for a client of his.

RE-CROSS EXAMINATION:

Questions by MR. CARY:

"Q. You mentioned the Washington Iron Works; what did you mean by that?

"A. I found out it was for the Washington Iron Works.

"Q. Who are interested in this litigation?

"A. I wish to say that the Washington Iron Works have never intimated to me a suit, that they expected to have a suit, and I am not employed by them in any connection pertaining to this.

"Q. Do you expect probable future employment by that company?

"A. That is a matter for the future to determine. I haven't been approached in that line at all as yet; whether they will, I can't say."

(*Transcript of Testimony, pages* 314 *to* 315.)

TESTIMONY OF F. B. MALLORY, recalled as a witness on behalf of the defendant:

Prior to the use of the H form of guard which we are now using we used a guard or spacer early in 1908 just below the lugs, half way between the lugs and the curve of the sheave we used a bolt, drilled a hole in each side and put a bolt through, and then a piece of pipe was cut and inserted over that bolt between the two sides, which acted as a guard, and also as a compression strip; the pipe on the bolt acted as a shoulder against each side, and the effect of this guard was to hold the cheeks rigidly in position; the shackle could be released without damaging the guard; we are operating under the Littler patent in using the H guard.

UPON CROSS EXAMINATION:

The spacer on the bolt guard had no connection with the lugs described in claim 1 of Gilchrist patent No. 1,063,528, and so far as the compression feature is concerned this guard does not conform to such claim.

TESTIMONY OF E. L. TAYLOR, recalled as a witness on behalf of the defendant:

I made a bolt guard for Mr. Mallory such as just testified by him, as far back as 1907 or 1908; manu-

factured them in quantities for him so he could put them on the market.

UPON CROSS EXAMINATION:

With this bolt guard he would have to take the bolt out and put the cable in, or else thread the cable through.

"MR. M'CARTHY: If the court please, Mr. Reynolds has further suggested that the opinion which he wrote and spoke of is bound in this volume of patents here, and we are perfectly willing for counsel and court to see to whom it was addressed; we would be glad to have you.

COURT: We will take his word for it.

"MR. PECK: He has already testified he had that in his hand during the time he was testifying and said he was testifying from that memorandum and that he acted as patent attorney. That is all we want."

(*Transcript of Testimony, page* 321.)

DEFENDANT RESTS.

TESTIMONY of WILLIAM TYLER, called as a witness on behalf of the complainant in rebuttal.

My age is 35 years; residence South Bend, Washington; occupation, logger for the past 22 years; started in the logging business at Grays Harbor in about 1898, oiling blocks with a common squirt can; at that time ox teams and horses were used and logging blocks were used as tackle blocks to remove extra heavy logs, the ordinary logs being moved by horses and oxen without blocks.

Started in the logging business oiling blocks and then I worked on the rigging where we were using blocks and lines all the time; about 7 years later I went to sawing timber; from that time I went to running camp for myself and for other people up to the present time; have been acting as foreman of a logging camp for about 11 years; ran my own camp up to 1914, and since then have run a camp a year for the Hammond Brothers, two and one-half years for the Case Shingle Company, and am now running a camp for the Kleev Lumber Company, during the last 11 years have logged on the average of a million feet per month; have run the camps with two sides, meaning two separate crews of men and separate engines, a side being a complete unit in itself; the biggest camp I ever ran employed about 150 men.

When I started logging, horses and oxen were used and logging with steam donkeys came in about 1902 or 1903; the first logging blocks used were pieces of scrap iron made in camp, the system of lubrication being to oil them with the squirt can; and you had to oil them every time you made a pull on them, and if you didn't, you wouldn't have any block; if the camp was any size it took a man steady to oil the blocks; the first blocks had no extra width in bearing.

The next improvement of blocks came about 1904 or 1905 when the compound or grease cup block was introduced; this was a block put out by the Bouse people with a plug in the end of the pin; you could put a little compound in there and screw down the

plug; then a little later another kind of a block came out with a cup which you screwed down with a regular cap, not an elbow, they didn't use them things, just used a sleeve on it, put a sleeve on where they had that elbow; the compound was hard grease which was forced in with pressure; these compound blocks stayed in general use until we got the Gilchrist block.

The first Gilchrist block I used was in the spring of 1910; the high speed donkey engine came in along about 1905 or 1906; the grease cup block was not a satisfactory appliance to work with a high speed engine, because you couldn't have a man around all the blocks and keep the cups turned down to keep the blocks from burning up; you had to have something that would oil itself; you would have to send a man around to turn down the grease cups about four times a day, twice in the forenoon and twice in the afternoon; in a big camp that would keep 3 or 4 men busy. The line runs through these blocks with a fast engine pretty close to a mile a minute; my actual experience with a grease cup block shows that they would not stand up under this high speed work; we were worrying along with a grease cup block before we got the Gilchrist block; prior to the use of the Gilchrist block I had never seen a self-oiling block of that type and had never heard of it; if I had I would have bought one.

The Gilchrist block has been a perfect success.

"Q. How are they a success over the grease cup block?

"A. Well, for the simple reason they are a cheaper block to operate. You don't have to have a man around to look after them, and one of them will last many days longer than any other block, because it it always oiled. You don't have to be buying parts for it every few months.

"Q. Don't burn it up?

"A. Don't burn it up every day or so."

(*Transcript of Testimony, pages* 327 *and* 328.)

The original cost of the Gilchrist block is a little more than the grease cup block; have used the Mallory self-oiling blocks interchangeably with the Gilchrist block, and I see no difference in the operation; the features of the self-oiling block which appeal to me are the strength of the material of the blocks, the building of the block, the mechanical work that is done on it, the guard which keeps our lines from cutting out the gooseneck, the self-oiling apparatus which makes it a cheaper block to operate, the better success with the sheave, it is self-oiling and it don't cut out, you don't have to buy bushings every two or three days to fix it up, it is always in condition; the extra width of bearing is of value because it gives the block more strength and renders it less liable to burn when under heavy duty; when we had the narrows sheave the bushing would squash out with a hard pull. We pushed the bushing right out, would cut the pin or break the sheave; in the use of logging blocks the pull is in every kind of a way you can conceive of; with a side thrust pull on a narrow sheave

with narrow axle bearing it would mash it right out, would naturally squash it right out on that side; the recesses of the sides and the hubs of the sheave projecting into the recesses in the Gilchrist and Mallory blocks are of benefit for the simple reason it not only protects the block from dirt and dust, keeps it out of the bearings, but it gives a longer bearing on the pin without putting extra weight into the block, you have a stronger block without extra weight by lengthening the hub of the sheave, if you don't do that, in order to have the strength in your block, you would have to have a sheave so big you couldn't do anything with it; in the use of blocks in the woods there is every chance for dirt to get into the block for it is dragge dthrough the ground, over rocks and sand, and everywhere it could be, to get a chance to get dirt.

I have been around other camps and the Gilchrist type of self-oiling block is being used everywhere that they can get hold of them; I would not buy any other kind of blocks and have all that type of blocks in my camps; I am using the self-oiling style of block rather than the old grease cup block, because the grease cup block costs a man too much money; he would be buying repairs all the time, they are no good after you get them.

Defendant's Exhibit "C" is not a practical block because it isn't a strong enough made block and it has that old compound rig on it that is no good, it won't stand up under heavy pressure; cut right out,

has small sheave; the compound rig on the outside is in the way, you can't pack it; if you hang it up it gets knocked off, you have nothing to oil with and nothing else; that kind of a block has to go through the dirt, over stumps and dragging all around through the woods, and there is not a thing in the world to prevent this oiling device from being knocked off; I have used that kind of a rig and had lots of trouble with it.

I never saw a block with a stove-pipe rigging like Defendant's Exhibit "D"; would not work very long; it might work until it got hung up somewhere and got a chance to knock that off.

"Q. What would tend to knock it off? Tell the court what would be your experience with that kind of a layout?

"A. The line throwing the block around and striking on the side of the tree, where hung on the side of the tree; supposed to put your line out in the woods, and to do that with a haulback. As soon as you started out, you would hit on a log or stump and tear that right off; you wouldn't have anything; your block would fly all to pieces, and there you would be."

(*Transcript of Testimony, page* 332.)

I never saw a block like the Morgan block shown as Defendant's Exhibit "BB," and never heard of that kind of a rig; it is not practicable construction for a logging block because it isn't built for a log-

ging block to start with, the hook would break off the first time you started to use it and the pin is too small; the oiling device would be torn off the first time you tried to put it out in the woods; these big high-lead blocks weigh 1200 to 1400 pounds and we drag them around through the woods on the ground, over stumps and boulders, and all that sort of thing. A side riveted on a 1400 pound block would not hold tight very long; you would never get it hung anywhere, I think. When these blocks are hung up high in the tree and there is a strain put on them, they swing away from the tree and when the strain lets up they jam back against the tree; when a 1400 pound block with a side riveted on, as in the Morgan block, is swung away from the tree, and swung back against the side, it would beat the oiling device right off, carry it right off there.

I am familiar with high-lead logging; in ground logging the logs are dragged right on the ground; in the high-lead work one of these big blocks is hung up in the top of a tree, as high as 200 feet and the main line is run through this block; then they hook onto the logs and the main line brings the logs in towards the spar tree, leading the nose of the log off the ground, the closer to the gin pole or spar tree the higher the nose of the log; that is what is meant by high—lead work,—the leading of the nose of the log high off the ground.

"Q. What has made possible the high-lead system of logging?

"A. The advancement in this block business.

"Q. Could you do the high-lead work effectively with the old grease cup block?

"A. No; we couldn't.

"Q. Did you ever try it?

"A. No, I never tried it, but it would be practically impossible; you would have to have a man up there every few minutes oiling the block."

(*Transcript of Testimony, page* 335.)

The high-lead block is up in the air from 140 to 200 feet, and the men who climb up the trees to adjust these blocks are specialty men whom we have to pay large wages to; it is dangerous work with lots of chances; the ordinary logger doesn't do that work at all and the men have particular equipment, like the men who climb a telephone pole, to do the climbing. If you were using the grease cup block with the present speed of lines, you would have to send a man up to look after the block 5 or 6 times a day and even then it would not work successfully; in my experience with grease cup blocks we burn them out no matter what care or attention we might give them; but we don't burn out these self-lubricating blocks.

"Q. Now, tell the court just whether or not this high-lead system of logging is an advance in the logging business, a step in progress?

"A. Yes, it is, for this reason, that you can take the same crew of men with high-lead, and you can put out at least a half more logs to a high-lead than

you could on the ground in the same locality. It is a big advancement for that reason.

"Q. Is it a step that has come to say in the art?

"A. I think it has, and all loggers that have made a success in the business says it has."

(*Transcript of Testimony, pages* 336 *and* 337.)

When these grease cup blocks would burn up we had to get another bushing and put in the sheave and fix the block up to go to work again, and while this was being done operations would be held up so that the men working on the line would be idle; if you had 15 or 18 men around there they would be idle until you got to going again; the self-oiling block does away with this suspension of operations.

UPON CROSS EXAMINATION:

My own camp, the Hammond Brothers camp, Case Shingle Company camp and the Kleeb camp were all in the Willapa Harbor section; I have also worked in the Grays Harbor section, but not running a camp; have had trouble with the elbow blocks and have used lots of them.

"Q. Then they were quite generally used, the elbow blocks, were they not?

MR PECK. We admit that."

(*Transcript of Testimony, page* 339.)

The high line system of logging has come into general use during the last four years; the small Gilchrist block had been on the market a long time be-

fore that; Gilchrist made the large block before high-lead came into vogue, he made them for yarding purposes; such blocks were larger than the blocks in evidence, butt chain blocks used for ground work; we had large blocks to move the machinery with and large donkeys before the high-lead logging was developed; never used elbows on blocks, I took the elbows off and put straight sleeves on them, which I liked better than the elbow; took the elbow off because I wanted to use compound; ordinary oil would not work if you left the elbow on, I tried it; I tried them with that elbow on but took it off and put the sleeve on; when I used the elbow the block burned up with soft oil, never used a wicking of wool or cotton for there was no room in there; blocks with the elbow couldn't be carried on the shoulder, the elbow would interfere with your shoulder, according to the size of the block you had on your shoulder, I suppose a man would know enough to put the side without the elbow against the shoulder; the big Tommy Moore, a thousand or twelve hundred pound block was made long before the regular high-lead block; that was a butt chain block; the old Tommy Moore block now used as a butt chain block with the elbow is not practical today; these big, heavy, high-lead blocks are dragged through the woods in logging operations in moving from one place to another and when in operation are up in the air stationary on a tree; we use the reservoir blocks both on the ground and up in the air; I used the large Gilchrist blocks with oil reservoirs before I used the Mallory type; am not positive when the Mallory high-lead blocks came out; first saw a large sky-line Gil-

christ block about 5 years ago; the line from the high speed engines runs pretty close to a mile a minute, as judging from the length of line and the length of time it takes to make a trip; on a yarding engine we use a 1600 foot line. The Case Shingle Company has an engine manufactured by the Seattle Iron Works which will pull that line in in less than a minute's time; I have an idea the Willamette Company has the biggest donkey engine trade on the Coast; I don't think the Willamette Company makes quite as fast a donkey engine as the Washington or Seattle Iron Works.

The Mallory hub does not fit as closely into the recesses as the Gilchrist hub and does not make what is called a dust-proof block, in that the construction is different; I don't know whether in the Mallory block there was an attempt to make a dust-proof block or not, but it doesn't make "very much" of a dust-proof bearing; the Gilchrist block is a practical dirt-proof block, the Mallory block is not; I can't tell the exact date when I first saw a long bearing; can tell the exact date when I saw the Gilchrist block because I used it; I also used a block of a long bearing but I didn't write down any dates; I naturally would know when I first saw the Gilchrist block from using it; the Tommy Moore blocks with long bearing, which I used, were put out in 1906 or 1907; the Tommy Moores had just as long a bearing in proportion to the size of the sheave as the self-oiling blocks; the Tommy Moore had a hole in the pin with a transverse

hole drilled from the center of the pin to the bearing surface and some of them had two holes; I saw that style of block as far back as 1906 and 1907; the pin had shoulders to fit up against the inside of the shell, but did not have threads; am familiar with the Bouse block pins, which at first did not screw into the sides; have seen a Bouse block with pins that didn't screw into the sides but don't know just exactly when or where; in 1906 I saw blocks with pins that screwed into the side of the shell; it was a common thing for pins to screw into the shell then, on one side generally, and to have long bearings if you needed them; some had recesses with long bearings and some did not, but the recess style of construction was on lots of blocks. In my logging experience all blocks had tops that you could release a pin from one end and throw open the shackle; I have been in the Polson logging camps; I never saw a block of the design of Defendant's Exhibit "3-X," for identification, and never heard of a block of that type.

Block marked "Defendant's Exhibit 3-X" for identification.

I worked around the camps in the early days of the Northwest and have seen the blocks and used them, but never saw anything that looked like Defendant's Exhibit "3-X." A logging block with an oiling device like Defendant's Exhibit "3-X," for identification, would not be practical for you would lose it the first time going through the woods, would knock

off the attached chamber; in the early days blocks were made from hammered out boiler plates; we had no cast sides.

"Q. Then the only method of putting the oil chamber on them in the early days would have been by either bolts or rivets, would it not, before the shells were cast?

"A. I don't suppose ever thought of putting one on."

"Q. If they did think of it, that would be the only way it could be put on, wouldn't it?

"A. I suppose so."

(*Transcript of Testimony, pages* 350 *and* 351.)

First saw a block with a cast side in 1905. Defendant's Exhibit "3-X," for identification, even if cast, would not be practical because of the make of it, no shape to it, the oiling device would not be practical, if cast on it, because it is too small; I suppose it would be practical if it were made large enough and cast on instead of bolted on; probably serve the same purpose as the Gilchrist oiling device; the question I have in mind is as to whether or not the oil reservoir is large enough and properly secured.

The high-lead blocks hang in the trees and when the line is tense would swing out from the trees, and when slackened up would slam up against the tree again; the blocks are swung so you can take them out of the tree and use either side; they are hung as close to the tree as they can be hung by a strap; some

blocks have swivels; most of them are not placed with swivels; the same side of the block would not bang against the tree if you turn it around, but the same side would bang as long as you could keep it that way; if the oil cup were on the outside of the block it would not hit against the tree but the jar would knock it off; the reason we took off the elbows and put on the straight sleeve was so we could screw the plug up better; the sleeve had about the same capacity as the elbow and projected out about the same.

"Q. Now if that block were built with heavy enough sides, with sides as heavy as are used in the Gilchrist and Mallory blocks, and if this oil reservoir was of as heavy material as in the Gilchrist and Mallory block; had a shackle on there, as heavy as is used in the Gilchrist and Mallory blocks; pin was of the same size, and the length of the bearing was the same as in the Mallory or Gilchrist blocks, what would you say as to whether or not that would be a practical logging block?

"A. Well, if built just exactly like that.

"Q. No, I am just giving the heft and weight and size.

"A. Not with that patch stuck on there, it would not be.

"Q. Not with that patch. Now if the patch were of the same shape there, and was a casting, a portion of the cast side, would that be practical?

"A. Would be the same as the Gilchrist then.

"Q. Just the same?

"A. Practically.

"Q. Wouldn't be any distinction between that and the Gilchrist if that were solid casting?

"A. If made just like it—

"Q. The same block. If that were solid casting you would consider the same as the Gilchrist?

"A. No, I wouldn't.

"Q. What would be the difference?

"A. Different shaped block.

"Q. The sheave is round?

"A. Certainly.

"Q. What particular portion of the shape?

"A. The build where the hook is, is a different shape.

"Q. If that had a shackle instead of a hook, would it be the same?

"A. I don't know. I would have to see the block. I don't know much about that kind of business. I would have to see the block and look at it."

(*Transcript of Testimony, pages* 353-354.)

The Gilchrist block is not made with hooks now; he has the pattern but not in common use today. The Tommy Moore style of block shown on page 1 of Defendant's Exhibit "B" is something like the block to which I referred in my testimony, something of that style; that style of block is not used very much now, might be in some places; I would not say that it was a practical block with that compound stuff on it.

UPON RE-DIRECT EXAMINATION:

The Gilchrist or Mallory self-oiling block will hang in a tree in operation without oiling for a length of time depending upon the work which it is doing; if it is working hard, it will hang at least two weeks and if not working hard it will hand longer; by a "set" in the woods we mean where we rig up a tree and yard all around it just as far as we can reach with our lines, that is one "setting" in the woods; when this block is filled and hung up in the tree as a rule it will operate without oiling for that setting so that as a general rule you only have to oil or fill it when you have it on the ground and put it up.

With reference to the line guard when you have the block hanging in the tree, if you don't have this guard on, your lines are coming back or going in with the log, the line is flying, the block will fly up and down and the line will fly up and catch here and there and saw into the oil well or saw the gooseneck off, or saw the line off, destroy probably 500 or 600 feet of line, and possibly ruin the block at the same time; that is the idea of the guard, to keep the line from flying up and fouling. The idea of the guard is to keep the line where it belongs for if a line does not follow the sheave the line will run across the gooseneck and saw it off and ruin it, or run into the side of the block; have had lots of blocks destroyed in that way and it was a very common complaint in the woods. This Gilchrist guard, Complainant's Exhibit 8, remedies that defect.

The first fast engines came in in 1905 or 1906 and then there was something like 4 or 5 years before the Gilchrist block came and we had no self-lubricating block; we fought along with them compound blocks, which were not practical for use with the high speed engines.

UPON RE-CROSS EXAMINATION:

In speaking about the quick trip of the line on a high speed engine, I referred to either way, whether loaded or unloaded, I didn't say that they hauled logs through the air at the rate of a mile a minute; with a log on the line there is no way of telling how fast it goes, according to how big the log is; when there is no load on the line, there is no great strain on the pulley; a double guard is a much better guard than Complainant's Exhibit 8, the one with two ears, similar to Defendant's Exhibit "V," is a better guard, and stronger than the Z-shaped guard; the H-shaped guard would resist the tendency to pull in the sides of the block better if there was any pull against it; to prevent the crowding in of the sides the H-shaped guard would be stronger; the Defendant's Exhibit "V" is a stronger guard than Defendant's Exhibit "W"; the bolt and barrel type of guard, testified to by F. B. Mallory, would keep the line in all right, but you couldn't get the line out, although you could release the shackle without removing such a guard; I don't know what is the relative speed of the drum of the donkey engine bringing in the load and the speed of the haul-back drum, although they

do not run at the same speed; I figure my estimate of a speed of a mile a minute from the distance our main line runs in and the time it takes to put our main line out; it takes our 1600-foot line about 20 seconds to run out; the time it takes it to bring a line in depends on how big the log is and how many times it hangs up; outside of the question of convenience of removing the cable, I suppose the bolt and barrel guard would be just as effective as any other; the shackle could be removed just as readily as the other; if one just desired to remove the shackle and not take the line off the sheave the bolt and barrel guard would do just as well as the style of guard shown on Complainant's Exhibit "8."

UPON RE-DIRECT EXAMINATION:

Whenever you relieve the shackle you want to relieve the line too.

"MR. M'CARTHY: If that is true, what is the advantage in the invention you claim? Does the plaintiff wish to concede as a part of the record, that whenever you want to remove the shackle you want to remove the guard. Do you wish to concede that in the record?

"MR. PECK: You don't get my question. What I said was, when you relieve the shackle you want to—when you move your block you want to get your line out; you don't take your block and move along with the line.

"MR. M'CARTHY: You wish to take the block off the line?

"MR. PECK: Certainly. Take the whole thing apart.

"MR. M'CARTHY: If that is conceded in the record, you can finish the case quicker.

"MR. PECK: No question about that."

(*Transcript of Testimony, pages* 262 *and* 263.)

UPON RE-CROSS EXAMINATION:

The high-line, sky-line and high-lead blocks have no guard like the Gilchrist guard; they have their yoke.

UPON RE-DIRECT EXAMINATION:

The reason for lack of guard is because the block is heavy enough and the yoke is heavy enough, the line stays down as it pulls on the block and the yoke is heavy enough to keep the cheeks apart.

TESTIMONY of WILLIAM F. HEGELE, called as a witness on behalf of the complainant in rebuttal:

My age is 33 years; residence—Seattle, Washington; was bookkeeper for Willapa Harbor Iron Works from 1913, going with them in the first part of 1913 and remaining 4 years and 11 months.

Witness identifies a copy of the letter of the Willapa Harbor Iron Works of date May 19, 1914, to Messrs. C. A. Snow & Company as the copy of a letter which he wrote as bookkeeper of the Willapa Harbor Iron Works.

"MR. M'CARTHY: Objected to as incompetent, irrelevant and immaterial. This is a letter which on its face purports to be written prior to the time this matter was taken up between Mr. Mallory and Mr. Gilchrist, and could have no bearing.

"COURT: Who is the letter addressed to?

"MR. M'CARTHY: The letter is addressed to Snow & Co., the Washington patent attorneys of the plaintiff here.

"COURT: I can't conceive what bearing that has on the question of laches between Gilchrist and Mallory; that is the only question in this case.

"MR. PECK: They have plead not only laches, but equitable estoppel, and that Gilchrist, by his course of conduct, has misled them. We have a right to show what his course of conduct was in this issue.

"COURT: As to the defendant Mallory. But the course of conduct of someone else would not be notice to Mallory.

"MR. PECK: With the question of equitable estoppel comes up the question of Gilchrist's good faith in this business.

"COURT: You can put it in the record if you wish, but I can't conceive what possible bearing it has on the question in this case. You can file it in the record.

"MR. M'CARTHY: While the record is not complete yet, it appears to me, if the Court please, largely as if this was an attempt to get the legal opinion in the record.

"COURT: I don't want that in; we have too many things in now.

"MR. PECK: We offer this in evidence.
(*Marked Complainant's Exhibit* 17.)

"COURT: You can identify them and file them, and if they are competent testimony they will be considered, but I can't see what bearing it would have on the subject of laches in this case. I understand the defense is that the Mallory Company was misled by the conduct of Gil-

christ, and as a matter of equity he ought not to insist, as against Mallory, on the validity of this patent, or the infringement, rather. That is what I understand the defense to be. Not that Gilchrist had abandoned the patent.

"MR. CARY: All we can show is that Mr. Gilchrist was diligent in ascertaining his rights, and these letters show that he was.

"COURT: He can testify to that effect. You can put it in the record, as I said, but I don't see what bearing it has on the case.

"MR. M'CARTHY: Under the practice there is no necessity of saving an exception?

"COURT: I think not, but you can save it, in order to keep the record clear.

"MR. M'CARTHY: Save an exception."

(*Transcript of Testimony, pages* 365, 366 *and* 367.)

Witness identifies letter of C. A. Snow & Company to J. E. Gilchrist of date June 8, 1914, and the same was introduced in evidence and marked "Complainant's Exhibit 18."

Witness identifies letter of June 15, 1914, from Willapa Harbor Iron Works to C. A. Snow & Company and the same was introduced in evidence and marked "Complainant's Exhibit 19."

The "infringer's ad" referred to in Complainant's Exhibit 19 was the ad of F. B. Mallory Company in the April, 1914, Timberman.

Witness identifies letter of August 19, 1914, to C. A. Snow & Company from the Willapa Harbor Iron

Works and the same was introduced in evidence and marked "Complainant's Exhibit 20."

Witness identifies letter to Willapa Harbor Iron Works from C. A. Snow & Company of August 25, 1914, and the same was received in evidence and marked "Complainant's Exhibit 21."

Witness identifies letter of August 31, 1914, from C. A. Snow & Company to Willapa Harbor Iron Works and the same was received in evidence and marked "Complainant's Exhibit 22."

Witness identifies letter of September 18, 1914, to the Willapa Harbor Iron Works from C. A. Snow & Company, and the same was received in evidence and marked "Complainant's Exhibit 23."

Witness identifies letter of November 12, 1914, from F. B. Mallory & Company to John E. Gilchrist and the same was received in evidence and marked "Complainant's Exhibit 24."

Witness identifies letter of November 16, 1914, addressed to F. B. Mallory & Company, and the same was received in evidence and marked "Complainant's Exhibit 25."

Witness identifies letter of November 17, 1914, from Willapa Harbor Iron Works to F. B. Mallory & Company, and the came was received in evidence and marked "Complainant's Exhibit 26."

Witness identifies letter of November 25, 1914, from Willapa Harbor Iron Works to F. B. Mallory, and the same was introduced in evidence and marked "Complainant's Exhibit 27."

Witness identifies letter of January 25, 1915, from C. A. Snow & Company to Willapa Harbor Iron Works.

> "MR. M'CARTHY: At this time I wish to make the same objection I did before, and save an exception."
>
> (*Transcript of Testimony, page* 369.)

Last letter introduced in evidence and marked "Complainant's Exhibit 28."

The letter of F. B. Mallory & Company referred to in Complainant's Exhibit 28 was the letter of November 12, 1914, Complainant's Exhibit 24.

Witness identifies letter of April 26, 1915, to F. B. Mallory & Company from the Willapa Harbor Iron Works and the same was introduced in evidence and marked "Complainant's Exhibit 29."

Witness identifies letter of April 29, 1915, to the Willapa Harbor Iron Works from F. B. Mallory & Company, and the same was received in evidence and marked "Complainant's Exhibit 30."

Witness identifies letter of May 6, 1915, to the Willapa Harbor Iron Works from Loyal H. McCarthy, and the same was received in evidence and marked "Complainant's Exhibit 31."

Complainant's Exhibit 31 contained a list of patents upon which the defendant claimed to rely; this was the first time that we obtained this list of patents; such list of patents was submitted to our attorneys, C. A. Snow & Company, in Washington,

D. C.; I remember receiving an answer from C. A. Snow & Company but I couldn't recall the date, have searched the file for a reply and cannot find it.

UPON CROSS EXAMINATION:

The answer which we received from Snow & Company recommended a course to pursue.

TESTIMONY of W. S. CRAM, called as a witness on behalf of the complainant in rebuttal:

Age—53 years; residence—Raymond, Washington; occupation—manufacturer of lumber; we are logging and manufacturing lumber at Raymond, conduct two sawmills and lumber camps; we are now logging about 7 or 8 million a month; am president of the Sunset Timber Company, devoting all my time to this business; have been interested in the logging business since 1902; am more or less familiar with logging blocks, using them in our camps since I have been engaged in the business; we first used a block with just two sides and a sheave which had to be oiled with an oil can; used that for about five years, I think; then later some one invented or brought into use what is known as the grease cup block and that was used for five or six years, and then self-oiling blocks of the Gilchrist type came into use; the first I ever heard of the self-oiling type of block was the Gilchrist block about five or six years ago; in the history of logging engines, when they first started, they used small engines and had much easier work; as logging progressed, the logging machinery was en-

larged and improved and a great deal of trouble was experienced with the oiling of blocks; there was a good deal of time lost with the blocks heating and having to put in new pins and new sheaves, etc.; I think it was five or six years after the grease cup block came in until the self-oiling block came; during that time of course progress was made in the size of the engines and the speed and everything else; the speed of the engines and machinery expedited logging so that we produced more logs; am familiar with the high-lead and sky-line system of logging which we used to some extent in our operations; I regard the high-lead and sky-line systems as a step in the advance progress of the business of logging; it is becoming more popular all the time. With the high-lead system of logging it would be possible to use the old grease cup system, but not practicable; it would be very cumbersome and we would lose a great deal of time with it because we would have more or less heating of blocks and pins; the blocks on the high-line are not accessible, so that the trouble can be corrected; they are usually up out of the way where it is quite a trouble to reach them; the self oiling blocks have displaced the grease cup blocks with the big companies to quite a large extent, particularly on the high-lead work and in important places or hard places; they are using the self-oiling block quite generally, I think; we are using quite a few of the self-oiling blocks and in the buying of new blocks today we are buying self-oiling blocks; I don't think we are buying any other type of block; am familiar with

the logging industry to quite an extent in the State of Washington; it is my understanding that the self-oiling blocks are used quite generally in the logging industry.

UPON CROSS EXAMINATION:

Am connected with the selling end of the business and the general management of it; logging blocks are bought out of our office; I do not have charge of the buying of supplies, but any changes in the purchase of equipment is usually referred to myself or Mr. Siler, or sometimes to both of us; I have heard the discussions about these blocks in other camps and the only personal observations I have had was in my own camps, what the foreman tells us of the operation of these blocks; I am not a mechanic and don't go out into the woods and superintend the camp; my information is based on what my foreman tells me; I know in a general way we are using self-oiling blocks; I know from my personal observations we are using self-oiling blocks; I see the invoices going through the office, I investigate and purchase them; first started on the sky-line plan of operation three or four years ago; I think we used the self-oiling blocks before we started the sky-line plan of operation; we used the Gilchrist self-oiling blocks; I don't recall the use of any Mallory blocks; Mr. Gilchrist's plant is near us and he is handy there and invented this block so we naturally used it; the Gilchrist block was a good block and what the industry needed; the industry needed a self-oiling block; I don't know who

pioneered the high-line logging in this part of the country; I presume it was some loggers that figured it out; I don't know whether Mr. Mallory introduced the high-lead logging into my section of the country or not; we have dealt with Mr. Mallory for a number of years but I couldn't swear positively whether we have bought anything lately from him; I don't recall seeing any invoices of Mr. Mallory for some time; I couldn't tell everything that is purchased for our camps, but generally when I am there I handle all the material, all the invoices, and pass the invoices to the different departments in our office. I open all the mail when I am at Raymond, but of course, when I am away, as I am today, these invoices come to the office and they are opened up and passed to the bookkeeper by someone else; my co-operation is to check from the financial end just what is doing and before making any important change in the buying we always discuss it; we rely upon and tell our purchasing man to buy logging blocks; we don't go and order blocks from the factory; we discuss any change in the design of blocks as we do concerning a change in all of our machinery; if we want to make any changes, we discuss it usually with Mr. Siler, Mr. Owens and myself; we instruct our superintendents in the mills and in the camps not to buy anything without first consulting Mr. Siler or myself; we often take the advices of our superintendents, that is natural; practical experience makes their advice necessary sometimes; we always try to analyze anything very carefully before we change; the first block we used was

just a plain block with two sides and a sheave, just used oil on the bearing and sheaves; can't just say how it was oiled, I think the oil was put right in the bearing; I am not a mechanic; some had straight pieces and some had elbows; we used black engine oil that you could squeeze out of a can to get on the sheave; it seems to me that there was some wool packing used in the box of the oil chamber, but I couldn't say positively; I couldn't describe the difficulties with that kind of a block for I didn't have the practical experience in using them; the self-oiling block is very important in the sky-line operation; sky-line operation has made it possible; self-oiling devices were always an advantage in any machine; the sky-line system of logging probably helped the demand for the self-oiling block, undoubtedly; if there had been no sky-line system of logging there might not have been a demand for the large self-oiling blocks; some ground is very rough and you have to have more powerful machinery to handle the logs, particularly down in our country, we have some very rough ground, ground that we could hardly use a high-line system on, and it takes some very strong block to log this ground; I don't recall but I think the self-oiling blocks came in after the sky-line system was adopted, as I understand the self-oiling block has been in use about five or six years; I wouldn't know a Gilchrist block from a Mallory block in going through a logging camp, unless I made inquiry; and unless I was making an inspection for that purpose I wouldn't notice whether the blocks had oil chambers at all;

from personal observation in the woods I couldn't answer positively what blocks we are using; as different designs and improvements in logging blocks have come out, I have naturally looked at them, considered them, and analyzed them as best I could; I am not familiar with the details of logging blocks since 1902; I am familiar in a general way with logging blocks; have never been what is termed a practical logger actually engaged in logging; I have never superintended a logging camp nor worked in one; have been interested in the way I have stated, handling the office, buying the logs, selling the logs, buying timber, opening up logging camps and buying supplies; I could not say whether logging blocks are generally made with removable heads or not; I don't know what you mean by guards on the logging block; I don't think I could tell you what a shouldered pin is, nor what a block is that has a pin terminally threaded in the sides.

> "MR. PECK: We haven't presented this man as a mechanical expert. We have presented him for his executive connection with the logging industry, as knowing the general course of the logging business as applied to this block business. That is the only way we have presented him."
>
> (*Transcript of Testimony, page* 386.)

I couldn't tell the mechanical parts of the block, am not a mechanic; we have men for that work; I haven't given the mechanical part any close study, nothing more than I know the self-oiling blocks and

know that we used to have an old oil can system, then the grease cup came, then the self-oiling block came.

TESTIMONY of H. F. WEATHERBY, called as a witness on behalf of the complainant in rebuttal:

Age—44 years; was roundhouse foreman and master mechanic with the Tacoma and Eastern Railroad Company from 1902 until 1906; during that time we built logging blocks for the Cascade Timber Company and for the North Coast Timber Company; the latter part of 1914 I took the agency for the Willapa Harbor Iron Works line of logging tools, having all the territory of Washington north of the South Bend branch; when I was with the Tacoma Eastern and while I was employed as machinist for the Puget Sound Iron and Steel Works, I handled logging equipment; when I was employed by the Tacoma Eastern we made a very simple block, the sides of boiler plate, riveted straps on the sides for the ears, a square hole in either side corresponding to the square end of the pin, both ends of the pin threaded for putting a thin nut on one side to hold the shoulders of the square against the sides of the block; we left enough thread to screw a pipe coupling on and then fitted a plug to force the grease through the hole in the pin, through a cross bore to the surface of the pin; we built that block from 1902 to 1906; I first heard of the self-oiling blocks in 1909, and I called on Mr. Gilchrist in South Bend and he showed me what he was doing with it; that was the first I ever

heard of the self-oiling patent block, in fact, it was the first cast steel side block I ever remember seeing; subsequently, in 1914, I accepted the agency for the Gilchrist line of blocks and handled them until August, 1916; in 1916, when I gave up handling the Gilchrist line of logging tools, the self-oiling block was used quite generally in logging camps, but not exclusively in any of them; it was very popular with high-lead and sky-line operation; I visited all the camps in my territory and I did not see any other type of block used for sky-line and high-lead work; I will modify that for I have seen them put the bull blocks in a tree for high-leads, but they generally gave a great deal of trouble; this was when they first started operations; nearly always, it is my observation, that they were replaced with self-oiling blocks; when I left the trade in 1916 the self-oiling block was generally used for high-lead work and I had some camps that were using the self-oiling block for ground operation, for ground logging and yarding; when I left the industry in 1916 the adoption of the self-oiling block was increasing; I am familiar with the problem of the use of the grease cup block in connection with high speed engines from my personal observations in the woods, and while the grease cup block could be used for high speed operations, it was not considered practical; in view of the self-oiling block the grease cup block was not a practical block.

UPON CROSS EXAMINATION:

While I handled the Gilchrist block from 1914 to 1916, I sold quite a few of the large self-oiling blocks, probably 20 or 24 of the large 24-inch blocks which weighed 700 to 1000 pounds; I understand the 36-inch blocks used in the sky-line system will weigh around 1400 pounds; I am familiar with the construction of blocks to some extent; I am familiar with the construction of the Gilchrist block and understand that it has a cored oil reservoir in the side; before answering whether the Morgan reservoir corresponds to the Gilchrist reservoir, I would have to know more about how the Morgan reservoir was put together, if the chamber is cast integral in the side I should say it corresponds to the Gilchrist reservoir, not like it, but the principle is similar. I would say that any liquid placed in the Morgan reservoir would flow through the pin and find its way to the bearing surface of the sheave; it would make no difference whether the reservoir was cored or not; in any construction the oil would flow down by gravity; gravity would act exactly the same whether using a cored reservoir, or whether a reservoir was attached; we made blocks with swivel cross heads removably connected with two pins so that you could draw one pin and hinge the top over, the gooseneck or shackle type was removably connected in the same way, that has always been the custom so far as I know; the pin which I described in the first block manufactured under my supervision was a shouldered pin with an axial hole with a cross bore to the bearing surface,

with the oiling arrangement outside; I never saw an elbow similar to Defendant's Exhibit "C"; I have seen blocks with elbows for oiling purposes in the woods; I never saw anybody oil them; have seen them in operation, but never saw anyone oil them; I sold the Puget Sound donkey engine; the Washington had a second motion engine that was faster than the Willamette engine; I don't recall what the speed was, but I hardly think it would have a speed of a mile a minute on the back haul of the line, not in excess of a speed of one quarter of a mile a minute; of course, that is very hard to determine, it all depending upon the speed the engine is running; have been in the Polson Logging Camps probably a dozen times and remember when they used to make the logging blocks with boiler plate sides hammered out.

"Q. I show you Defendant's Exhibit '3-X' for identification, and ask you if you recall seeing any of these blocks in the Polson Logging Camps?

"A. I saw—I couldn't say as that particular construction, but I believe the principle was very similar. When I was calling on the Polson Logging Company, my recollection—this is purely memory—was the fact they had a flange arrangement riveted on the sides here, and they had three or four—

"Q. Rivets?

"A. No, bolts. I said riveting. It was bolted on.

"Q. Was a reservoir, was there not?

"A. Intended for such.

"Q. Used as such, wasn't it?

"A. Why, Mr. ——

"Q. Just a moment; answer my question.

MR. PECK: Let the witness answer the question.

"Q. I am asking the question, not what 'Mr.' said. I asked if used as such.

"A. I never saw it used as such.

"Q. Do you know that was what it was intended for?

"A. That is what it was intended for.

"Q. How long ago did you see one of these blocks in the Polson logging camps?

"A. I don't just recall the date, but I would say it was in 1907 or 1908.

"Q. 1907 or 1908?

"A. Yes; this is purely memory; I have nothing to check from.

"Q. Do you know anything about how this block operates, the interior of it?

"A. Not a thing.

"Q. Do you know whether it had an axial bore in the pin?

"A. I assume it had; I never saw it. I couldn't say.

"Q. You knew it did have a reservoir bolted on, or riveted on the side.

"A. Had a container.

"Q. For oil?

"A. Intended for oil.

"Q. And the whole would indicate that was used for liquid oil, would it not?

"A. It would."

(*Transcript of Testimony, pages* 396, 397 *and* 398.)

UPON RE-DIRECT EXAMINATION:

Referring to the Morgan block as shown by Defendant's Exhibit "BB," I would say that the block was not practical in measurements and general design; logging blocks in the woods suffer hard service and a block of the Morgan type in the light of the present art as shown by the self contained chamber, with a chamber that is stuck on the outside to receive knocks and blows, would be impractical in logging camps; the same thing is true with reference to a block of the type of Defendant's Exhibit "3-X," for identification.

UPON RE-CROSS EXAMINATION:

If I was ordered to make up a block with an oil reservoir, I would use a full cast construction; if the block is to be used for logging service it must be a cast side; from the standpoint of a machinist, if I was to construct a block, I would have to know what class of service it was to be used for; then I could give you some idea of what I would consider practical for that particular thing; if for a logging block, I would consider that it would call for a cast steel block, and if the order came before there were cast sides, I would consider it an impossibility; in 1902, before I saw any casting, I could have constructed a logging block with a swivel that would have been practical for the type of logging equipment that they had at that time; a practical oil chamber cannot be constructed on a block side without casting it integral with the side because there is no way of protecting it;

no one has ever been able to fasten a reservoir upon the side so that it would be as secure as if cast in the side; I could not do it; whether a side made out of boiler plates with pieces properly secured with bolts or rivets would stand more blows than a casting, depends on the nature of the casting; that it a matter for a metallurgist; a casting properly annealed and heat treated will stand as much of a blow as wrought iron or steel; castings in logging block sides as now manufactured would stand as much of a blow as the sides of Defendant's Exhibit "3-X," for identification; a quick blow has a tendency to crack anything; a quick blow sets up a physical strain in wrought iron as it does in casting; in an indirect way I know something about the factor of safety in connection with stresses and strains of materials; without elongation on a straight pull, flanged steel is usually figured on a strain of 60,000 pounds to a square inch; with reference to the question of blows or jerks I do not know the factor of safety but would have to refer to a text book; I don't even qualify as an expert and that is strictly an engineering proposition; I don't recall having seen a logging block break but have repaired them after they were broken; if the oil chamber were cast, it would be an integral part, would be a box section, would add materially to the strength of it; parts of boilers are cast, but I don't know why they do not cast the whole boiler; I am not a boiler maker; boilers are fastened together with rivets with the effect of welding the parts together; I don't think the boiler making business is comparable to the block making

business and I don't think I should be called to make an answer of comparison; I do not think that a boiler plate with less thickness than used in castings would stand as much strain, but it would if of the same thickness.

TESTIMONY OF JAMES BRAZEL, called as a witness on behalf of the complainant in rebuttal.

Age—48 years; residence—South Bend, Washington; occupation—logger in the State of Washington for the last 30 years; I started in the logging game with a job of greasing the skids and blocks and worked at all the different kinds of jobs in the logging camps up to superintendent of a camp and have owned a part interest in different camps; have been foreman and superintendent of camps in an executive capacity, for the last 15 years, and during that time have logged fifteen to twenty million feet per year.

The first logging blocks we had were constructed of boiler plate made in the camp by the blacksmith, consisting of two shells with straps on the sides forming the ears, a cross head, pin and sheave, oiled with a squirt can through a hole drilled angularly through the straps to the pin; in 1902 or 1903 the Bouse block came into use, which consisted of two sides and a pin, with the pin drilled lengthwise and a plug in which we used compound; the compound or grease was forced in by screwing down a plug under the same principle of pressure found in grease cups on a modern automobile; the grease cup block was attend-

ed by men who looked after them in the woods, who were supposed to go around and screw the plugs down every so often, according to the amount of work they were doing; if the blocks were under heavy pressure, the plugs were screwed down a good deal oftener than on a light draft; sometimes the men would forget to screw down the plugs and we burned up the blocks; we had more or less trouble with all that kind of grease cup blocks; when the block stopped we generally took it down and got another block to hang in its place until we got it fixed; until the block was replaced the crew that was working around the engine was practically doing nothing.

I first heard of the self-oiling block in about 1909; Mr. Gilchrist showed me a model of his self-oiling block; I couldn't say exactly the time, but I distinctly remember in 1911, after he got his blocks out, that I bought some of his blocks; it was before he got his patent out, I think about the Fourth of July in 1909 that I saw his model and we were talking about it; we are now using the self-oiling type of blocks of the Gilchrist type and do not use any other; a man couldn't sell me any other type of block now, the other type of block has gone out of date; the advantage of the self-oiling block over the grease cup or former types of block is, that when we move a setting we fill the block and don't bother again until we take it down; it is in there for that setting; the Gilchrist blocks will hold oil for a long time in operation; the first block I put up was a Gilchrist block

and we hauled somewhere in the neighborhood of about fifteen hundred thousand feet of logs through that block and it was up for six weeks; in taking it down we took it apart to see how much oil there was in it and it was about one-third full; during that six weeks the block was in continuous work every day; I figure that the self-oiling blocks hold sufficient oil for any one setting and I never figure on oiling the blocks on one setting; of course, it might be possible, a man would have to oil the blocks more than once in a setting if he had a great amount of timber, but I never had that much timber.

If you have to go up in a tree to oil a block, it would take a man probably about half an hour, to pull him up there and put the oil in and take him down; while this oiling was going on that part of the outfit would have to be closed down; we usually have one man in the camp who is called a high-lead man for that kind of work and we pay him extra; the work of oiling the high-lead blocks isn't a job for everybody to do; only now and then you get a man to do this kind of work; they require large wages.

The type of self-oiling blocks has practically displaced all other types of blocks entirely, will in time; a good many outfits have discarded the other blocks altogether; I suppose some of the smaller outfits are still using the old type of block; a good many of them had this rigging bought and they hated to throw it away, but as it goes out of commission they replace it with the self-oiling blocks.

Have been familiar with the high-lead and skyline systems of logging for the last three years; the high-lead system has come to stay and I believe eventually it will be all high-lead and high-line hauling.

When I first came to the State of Washington logging was done with an ox team; the first donkey engine I saw was along about 1898, a small engine called the Dolberry; they kept increasing the speed of logging engines from that time on; the next type with two drums I saw in Seattle in about 1900; as they increased the size of the logging engines, they increased the speed of them, and about 1905 they got a pretty fair speed on their small engines; we always had more or less trouble with the oiling systems of blocks until we got the self-oiling blocks; before the self-oiling block came there was always a demand for a better system of oiling and a great many men studied on it and got out different rigs, but the compound system seemed, for five or six years, to be the only system we could get that would come anywhere near giving us any satisfaction at all.

Have used the Mallory type of self-oiling block and it is the same block as the Gilchrist block so far as I could see, outside of a few minor changes.

UPON CROSS EXAMINATION:

In the Mallory block the oil enters the axial hole of the pin through a radial hole, while in the Gilchrist block it enters through the end of the pin, and there is a distinction in that regard; some of the blocks

have one and some have two reservoirs and the sides are interchangeable; the sky-line Mallory blocks which we use have two reservoirs; the Gilchrist blocks have two reservoirs, the kind he is putting out now; I couldn't tell whether Mallory or Gilchrist made the first high-lead block; the first one I saw to take notice of with two reservoirs was the Gilchrist block about three years ago; that was the first block I bought myself and put up.

The main trouble with the first blocks we used with boiler steel sides was the oiling system; under the strain of the logging work and the moving donkeys, the brass bushings would squash out, consequently it would rub against the sides of the sheaves, cut the brass, fill up the oil holes, and you couldn't get oil to the pin, consequently the block burned up; I remember when the long bearings were introduced and my understanding is that they were put in to do away with the trouble of squashing out the bushings; the long bearings had a tendency to overcome the squashing out of the bushings; don't recollect seeing boiler plate blocks with a long bearing; there were blocks of the Tommy Moore type with a very long bearing; have seen one of these boiler plate sides pull all to pieces; have seen the sheave stripped right out, tear the sides right out, nothing uncommon; that was due to an excessive load which will happen sometimes with any kind of a block; have seen the boiler plate sides twisted out of shape, bent up, but they don't break unless you get an excessive strain on them, they tear them to pieces; can't say whether the boiler

plate sides would break as readily as a cast side; have seen the cast sides twisted out of shape pretty badly and still not break, in fact, I have seen them bent, twisted right over; my opinion is that the breakage of the boiler plate block about offsets the breakage of the cast block, don't think there would be much choice between the two on the question of breaking, knocks and blows in the woods.

All the blocks that I have used for the last twenty years have had removably connected tops, cross heads, shackles, that by removing a cotter pin and drawing out a pin you could throw the top back; the shouldered blocks have been in use for twenty years; I have seen some haul-back blocks with recesses in the sides with very long bearing.

I have seen blocks like Defendant's Exhibit "C"; these blocks came out for the purpose of using oil, but we loggers didn't figure that was a practical way, for when the block is run at high speed it gets hot, the oil gets thin, and runs right out of the block so that the block burns up; it won't do it so much with a grease or compound; the hot block doesn't affect the compound unless you put pressure on it; Defendant's Exhibit "C" is constructed for either soft oil or comound with pressure; the elbow blocks were put out as soft oil blocks; the plug that fits into the elbow is a straight plug; that is the kind of a plug we used; we had a plug made to screw right into the couplings the same size all the way, those have been made for years; that is what has been used in

any compound cup; I never used that elbow, I took them elbows off and put on a sleeve and filled it up with compound and put a plug in; don't know as there would be a great deal to prevent the oil from running out of the block any more than out of the reservoir block if you had any oil there to run, but the elbow block wouldn't hold much oil; the fact of the matter is, we use them haul-back blocks in all kinds of work and logging business; we use them for instance in moving the donkey, they are not hung up in a tree all the time; those elbows wouldn't stay on there fifteen minutes if you started to move a donkey in the mountains; the haul-back blocks are used for moving the donkeys just the same as they are used hung up in a tree; they are not the main block in moving the donkey, we have what we call the moving block for moving donkeys, at the same time, if we are taking a donkey in the mountains, we probably would stretch out four or five of the haul-back lines, to hold the donkey from running away down the hill.

Some time along in 1909 I talked to Mr. Gilchrist about this patent, he had a patent out for it; I was in Mr. Gilchrist's shop in an ordinary business way buying stuff for the camps; I didn't think anybody was assisting him in planning his self-oiling block; my experience with Gilchrist is that he won't take anybody's advice with regard to things; you can't impose your ideas on Gilchrist because he has ideas of his own, and you can't change them.

The highest speed donkey I know of is probably a thirteen by eighteen Seattle and the mean speed all depends on the engineer that is running the donkey; I judge that the haul-back line could be put back in the woods at the rate of a mile a minute if a man wanted to run the engine that fast; the main line that hauls the load could probably haul logs at a thousand feet in a minute and a half, if they didn't hang up; that would be about as high speed as practical.

I don't know who pioneered the sky-line mode of logging in the Pacific Northwest; it came about gradually; we first started in to use it by moving the donkeys up on a hill, yarding up hill instead of down hill; I remember seeing the models and cuts of the sky-line system in a catalogue; the idea was carried from one man to another; I changed from the old style to the sky-line and high-lead system and didn't consult with anybody particularly, knew that the thing was in operation and went to the Mason County Logging Company in the Black Hills to see it in operation; had seen illustrations in catalogues but can't say whether I got my idea from that or somebody told me about it; I had heard about this high-lead system and how it worked, talked to people that had been actually engaged in it.

Prior to the introduction of the high-lead system we used blocks weighing from 30 to 1000 pounds; the thousand pound block was the Tommy Moore; we would hang these big blocks up about 30 or 40 feet, long before the high-lead system was intro-

duced, never used any of the large type of self-oiling blocks before putting in the high-lead system; when I changed to the high-lead system of logging, I changed to the self-oiling style of block; prior to that time I was using the old style of blocks as yarding blocks and haul-back blocks. The high-lead system had been used more or less for years before I adopted it; I have a man in my camp to look after the high-lead blocks when I can keep him; but they are not always available, sometimes I borrowed a man; it cost me $50 to get the man to go up and change one block; we don't inspect these blocks every few days, we never inspect the self-oiling blocks unless we want to change them; it has been my experience that the self-oiling blocks have run under continual work for six weeks without oiling.

TESTIMONY OF H. J. OWENS, called as a witness on behalf of the complainant in rebuttal.

Age—57 years; residence—Raymond, Washington; occupation—a logger for the past 22 years; first experience with horses and then about 2 years later, in 1900 or 1901, I went to logging with a donkey engine and have been logging with a donkey engine ever since; have been manager of logging camps for the last 20 years; logged for myself a long time as an independent logger, then went with the Owen Logging Company which is putting out about two million feet of logs per month; have been manager of that company for the past 16 years.

In 1904 we used the Gilchrist logging block which was then oiled with an oil can through a little hole drilled in the side of the shells intersecting with the pin; the last block we used was the grease cup block made by Mr. Gilchrist and the next type we used was the Gilchrist self-oiling block, which I first bought in March, 1910; he gave me a block at that time to try out; he had then made application for his patent; since 1910 I have used the Gilchrist self-oiling blocks; I think we have a Bouse block in the camp and one Mallory self-oiling block of the same type as the Gilchrist block; we use nothing else but self-oiling blocks in our camp now; I know from talking with other loggers in Washington that they are all adopting self-oiling blocks; the outstanding features of the Gilchrist type of block are the long bearing pin or hub, the self-oiling device and the hinged top; the long bearing gives less pressure on the pin and the brass bushings by distributing the pressure over greater area; the blocks which we had prior to the self-oiling blocks were the best we had, I don't know whether you would call them efficient or not, but they were the best blocks we had and we considered them good blocks in those days.

UPON CROSS EXAMINATION:

There is always a demand for something better if we can get it, and progress is being made in all methods of work—of logging and in equipment of all kinds; a large portion of this advancement is due to the requests of the loggers in the woods; improve-

ments in logging devices I believe have come as a result of the requests of the loggers, that is, I think that they have come from observation; the logger in the woods knows what is needed and he tells the equipment man what to furnish; when I first started in the logging business we had blocks hammered out of boiler sides and they were tolerable, fair sides in those days; we didn't have much trouble with the sides, the trouble was mostly with the cutting of the pin, wearing out the pin or the bushing giving way, no particular complaint of the sides; the case side is more subject to breakage than the boiler plate side, I think; all the blocks which I have used have had removably connected tops, also shouldered pins; in 1905 or 1906 I used the combination of oil going through the pin with a grease cup on it, but don't think I used pins with a long bearing as soon as that; the sides are held together either by the cross head or shackle at the top or by an axial pin through the center; the axial pin holds the sides together either by a screw or a threaded portion of the pin, or by a burr threaded on the outside; they stood the knocks and bumps in the woods very well, if you riveted a piece on the outside any blow which would knock that piece off might or might not knock the sides apart, but, of course, would be liable to spring the sides, possibly; the side plates of a block; the side plates of a block only have two points of contact near the top and at the axle; two pieces of plate can be more securely fastened together where they come in contact all around the outer edges, than where

they only come in contact in two places; you could rivet a piece on the outside of the shell that would be as secure as the position of the connection of the two sides; there would be no great difficulty about a riveted oil reservoir being knocked off but there is great chance of its leaking.

"Q. Be a chance for leaking?

"A. Yes.

"Q. If got bent out of shape a litttle?

"A. Don't require much bending; take a riveted oil cup—

"Q. You know how they pack joints—steam joints?

"A. Yes.

"Q. And how they pack the sheets in their places under pressure, where no leakage? They put in what is called gaskets or rubber packing?

"A. Yes, sir.

"Q. If gaskets or rubber packing where fastened on, there wouldn't be great danger of leakage, would there?

"A. Might not leak right on the start, but I think the usage of the block would cause it to leak.

"Q. You know the way boiler plate is secured together in making boilers?

"A. Well, I know practically, yes.

"Q. Makes a practical weld, doesn't it, the way it is put on?

"A. Yes.

"Q. The rivets going through, and if a piece of plate were attached to the side of a block side, of

boiler plate, in the same manner, do you anticipate you would have much trouble about leakage?

"A. Yes, I think there would be.

"Q. What is that?

"A. Might be liable to leak, yes.

"Q. You think a blow would cause that to leak before it would break the sides apart?

"A. Yes, sir.

"Q. And still not break the sides apart?

"A. Yes, sir, I think so.

"Q. Practically all of your blocks are Gilchrist blocks?

"A. Yes, sir.

"Q. And always have been?

"A. Yes, sir.

"Q. You don't know much about any other kind of block, do you?

"A. No, sir, don't pretend to.

"Q. You never had a block with an oil reservoir riveted on the side that you have used, then?

"A. No, sir; I think we have—I did have a blacksmith, man by the name of John Smith, put a patch on a block.

"Q. A reservoir?

"A. Yes, I guess you call it a reservoir.

"Q. An oil container?

"A. But it wasn't a success.

"Q. When was that done?

"A. That was along about—somewhere between 1909 and 1910; may have been 1910; I wouldn't say for sure.

"Q. Have you ever been in any Polson logging camp?

"A. No, sir.

"Q. You don't know anything about the old Polson logging block then, with an oil reservoir

"A. No, sir.

RE-DIRECT EXAMINATION:

Questions by Mr. Peck: You say that block you did experiment with, with the blacksmith putting a patch on the side, was not successful?

"A. No, sir.

"Q. What was the matter with it?

"A. Leaked.

CROSS EXAMINATION:

"Q. Did you put a gasket in between?

"A. It was packed with wicking.

"Q. Packed with wicking? I mean between the sides, where the riveted plate?

"A. Packed with wicking.

"Q. That leaked before it was ever banged around at all, didn't it?

"A. No, it seemed to hold all right on the start, but woudn't stand the banging."

(*Transcript of Testimony, pages* 434 *and* 435.)

It fed the oil all right through the end of the pin; the operation of the lubrication was successful, only it leaked; the Gilchrist blocks were successful when they first came out.

UPON RE-DIRECT EXAMINATION:

The Gilchrist block didn't have the Z-shaped guard when it first came out; the guard was of advantage in that it kept the line from fouling on the block; one can get along without the guards in using lighter blocks, but it is impractical.

UPON RE-CROSS EXAMINATION:

Never had a block with the bolt and barrel form of guard, had the H-shaped guard similar to Defendant's Exhibit "V"; haven't seen many of the Z-shaped guards but I think there was one or two blocks in the camp with Z-shaped guards, most of them have H-shaped guard; I consider the H-shaped guard a better guard than the Z-shaped guard, it protects the block in keeping the sides from spreading apart and also from pushing in. I think the H-shaped guard will stand a bigger strain on compression and tension than the Z-shaped guard. The connecting member in the H-shaped guard performs practically no other function than that of holding the compression links together, not particularly any strain on that, and the line can't damage that in any way. I don't suppose the connecting member could act as a guard for it performs no function except holding the compression links together.

TESTIMONY OF RALPH V. PEARCE, called as a witness by the defendant in rebuttal:

Age—60 years; residence—Centralia, Washington; have followed the logging business nearly all my life;

I worked in camp for wages and have owned camps; went to work in the camps in 1887, worked until 1903 and then stopped until the steam logging came in; opened up camps for myself in 1907, worked until the fall of 1909, stopped until the spring of 1911, and opened camp again, and worked until 1913; in 1916 bought a donkey and logged until the close of the war.

Have been familiar with logging blocks since I was a boy; the first I ever heard of the self-oiling type of block was in 1912, which was the Gilchrist block, and from that time to this all the blocks which I have used have been the self-oiling Gilchrist type; I would buy no other type of block because the other blocks give too much trouble and you don't have to watch the self-oiling blocks so much; my experience has been that you can leave the self-oiling blocks and know that they will be running without depending upon some human agency to oil them or turn down the grease cups; the first self-oiling block I bought was a trip-line block and my instructions were to hang it up and let it alone for three weeks; I did so and after continuous operations for three weeks I examined it and it had oil in it; have done high-lead work and owned three high-lead blocks; in my judgment the high-lead system of logging has come to stay; I wouldn't think of logging at all any more in the old style way on the ground; not only in rough ground, but in soft ground, the high-lead and skyline systems of logging are particularly adapted.

UPON CROSS EXAMINATION:

Never used any blocks with elbows for oiling; I had all Gilchrist blocks when I sold out; part of these Gilchrist blocks had guards on them like Defendant's Exhibit "V" with two compression links extending directly from the pin on the one side and the pin on the other with a connecting piece between the two; in case of a heavy load on the block with the tendency to pull the sides together, I don't know whether the H or the Z-shaped guard would be better, the supporting piece in the center ought to be a pretty good brace; the H-shaped would be a better guard than the Z-shaped guard; never used a Z-shaped guard that I know of; if it came to the point of spreading the sides the element in the center of the Z-shaped guard would have very little utility; all the blocks which I have used have had removably connected or hinged tops, and I don't recall any block that I ever used but what had some way of taking the line out and putting it in without taking the block to pieces. The first long pin block that I ever saw was the Skookum in 1907 or 1908. It had to have recesses in the sides of the shell with projecting hubs in order to have long bearings; it had an axially bored pin with a radial hole to the bearing surface, I think.

TESTIMONY OF B. A. WHEATON, called as a witness on behalf of the complainant in rebuttal:

Age—53 years; residence, South Bend, Washington; occupation—building sleds for donkey engines and mounting engines since 1907; the business of

selling donkeys and putting them in the woods has been my main business since 1907, removed these donkeys with logging blocks and lines; have moved donkeys eight or nine miles at times with a moving block; a moving block is a block with a specially large sheave built on the same lines as a yarding block, excepting that it is larger and heavier and is universally a gooseneck or shackle block; when the donkey is moved, the block is permanently fastened to the tree and the bight of the line is through the block; the grease cup type of block is not very successful; the grease cup elbows are hard to keep on as rough as you use moving blocks; when setting the rigging to move a donkey, you have to have some way to get your moving block out, and you generally take it out with a haul-back block so that the moving block is packed through the snow, mud, brush, or whatever happens to be in the way without reference to what shape it is in; have used the self-oiling block in suit, and it is a far superior block to the grease cup block in that it takes less attention, is more efficient and stays lubricated better; any block with a recessed hub stays clean on the bearing better than a straight sheave block and the more dirt you keep out of the bearing the less wear on the pin.

Am familiar with the logging equipment used in the western part of Lewis County, Washington, and Pacific County and part of Grays Harbor County, where I worked moving donkeys and in these camps it is the fact that the self-oiling type of block is al-

most universally displacing the old grease cup type of block; there are some grease cup blocks but the new blocks are all self-oiling blocks.

UPON CROSS EXAMINATION:

Am only speaking of the use of blocks in the locality where I am acquainted; an elbow block with recessed sides would exclude the dirt from the bearing just as effectively as an oil chambered side with the recesses, and the lubrication would be just as good as long as the oil was there, the difference would be that the reservoir and the pin in the elbow block would not be as large as the reservoir in the oil chambered block and you would have to oil more frequently, a matter of convenience to save from oiling so frequently; moving blocks are close to the ground where you can oil them if you happen to see them in time; have seen several different makes of blocks with lubricating sides, and many of the leading logging supply houses make moving blocks with oil reservoirs in the sides; with the fast donkeys we have I think the haul-back line moving so rapidly created one of the first demands for the auto-lubricating or self-oiling blocks. The blocks which have been used in my vicinity since 1907 have had removably connected tops, either a cross head or a gooseneck shackle so that they could be readily disconnected; have seen blocks with guards and some of them have been an H-shaped like Defendant's Exhibit "V"; have seen a few guards of the Z-shaped similar to Defendant's Exhibit "W," but not very many; most of the guards

were of the H-shape; the main function of the guard is to keep the line down so that it will not fly up into the gooseneck shackle; most any kind of a guard will serve that purpose; the bolt and barrel form of guard would serve that purpose but would be hard to get in and out; you seldom release the shackle until after you have thrown the line out; you can't release the line of your sheave without releasing the shackle; I know of no advantage in having a guard stay in place when you release the shackle.

TESTIMONY OF J. E. KELLY, called as a witness on behalf of the defendant in rebuttal:

Age—32 years; occupation—moulder serving apprenticeship with Willapa Harbor Iron Works, which was completed in November, 1909; while an apprentice I worked on the Gilchrist self-oiling block, first started to do some work on that in September, 1909, under the instructions of Mr. Gilchrist, working from a wooden pattern which Mr. Gilchrist had made; the first pattern that he gave me I didn't get a very good casting from and he had another made by a pattern maker and I got him a casting that was good for all purposes that he wanted, in about the first week in October; I saw the first block assembled which was sent to the patent office, I believe before my time as an apprentice was up; I heard that the block was sent to Snow & Company, patent attorneys.

Witness identifies an exhibit as being half of the block side made by him before the middle of November, 1909; this block side was made for the same purpose as the other, except that the other had one ear

Exhibit introduced and marked "Complainant's Exhibit 32."

Witness identifies a guard marked "121-CH," with the words "Gilchrist Patent" on the same, as being a guard which he took off from a Stewart block which came into the Willapa Harbor Iron Works for repairs, being a type of guard made b ythe Willapa Harbor Iron Works.

"MR. PECK: I offer this in evidence.

MR. M'CARTHY: For what purpose?

MR. PECK: To show acquiescence. We have a right to show acquiescence of the manufacturing trade to our patent, showing the construction of the trade, interpretation of the trade.

MR. M'CARTHY: We object as incompetent, irrelevant and immaterial. No connection between the defendant and the Stewart Brothers. Shows no license on the part of F. B. Mallory.

COURT: Admitted for whatever it is worth.

Offered in evidence and marked Complainant's Exhibit 33."

(*Transcript of Testimony, page* 458.)

I saw the first Gilchrist self-oiling block assembled as a practical working block having one lug on the sides, between the first and the middle of October, 1909.

TESTIMONY OF CHARLES S. COREY, called as a witness on behalf of complainant in rebuttal:

Occupation—machinist; worked as a machinist for Willapa Harbor Iron Works in 1909 and 1910; saw the first self-oiling block assembled in the month of October, 1909; I fixed that date because the Alaska Yukon Exposition was held in Seattle in 1909, and when I came back from visiting the Exposition on the first of September, 1909, I saw the first pattern; the second pattern I saw about the first of October and the block was cast as quick as we could get the casting pattern and was then assembled; to my knowledge the first assembled block was shipped to Washington, D. C., leaving the plant somewhere near the first of November, 1909; went to work for Mr. Gilchrist in 1903 and worked for him until April, 1911, and again from September, 1911, to May, 1913, again from May, 1918, to date, and from 1903 to 1911 I know that Mr. Gilchrist was working and experimenting on a logging block.

"MR. PECK: Mr. Gilchrist, will you please withdraw. (Mr. Gilchrist leaves the room.) Mr. Gilchrist, the plaintiff in this case, about a year ago, suffered a cerebral hemorrhage and had what is known as a shock. He has also advanced heart disease and Bright's disease. He came up for the purpose of attending this trial, and participating in the trial, last Saturday night. Sunday morning I examined him in the office, and he became so incapacitated physically that I sent him to a physician. We have the physi-

cian here, who will testify as to his condition, by way of excuse for not putting him upon the stand."

(*Transcript of Testimony, page* 461.)

TESTIMONY OF DR. WILLIAM S. KNOX, called as a witness on behalf of the complainant in rebuttal, whose qualifications as a physician and surgeon are admitted by the defendant:

Am acquainted with the complainant, Mr. Gilchrist, and examined him first in May, 1919, and again two days ago in my office.

"Q. What is his physical condition as to the propriety of putting him on the stand and undergoing a strain, in this case?

"A. Well, in the first place, Mr. Gilchrist is 64 or 65 years of age. He has an advanced arterial schlerosis; what I mean by that is stiffening of the arteries. He has a chronic affection of the heart muscles, and also kidney change, which we call Bright's disease. In addition to that he had, a year ago, a hemorrhage in the left side of his brain, from which he has not fully recovered, as yet; and when I was asked as to whether I would consider it proper for him to testify I advised very strongly against it, regardless of what was at stake. I did that for the reason that any excitement as well as any severe physical exertion, might easily precipitate another hemorrhage, and cause death."

(*Transcript of Testimony, pages* 461 *and* 462.)

UPON CROSS EXAMINATION:

I referred to hemorrhage of one of the vessels of the brain, that is, apoplexy.

TESTIMONY OF J. C. PRENTISS, called by the complainant as a witness in rebuttal:

I was a blacksmith for Mr. Gilchrist from the spring of 1905 until May, 1910, and saw the first self-oiling block assembled of the type in suit here; this block was completed not later than the middle of November, 1909; I fixed that time by the fact that I left in the spring of 1910 and I know the block was completed in the fall before I left.

TESTIMONY OF CHARLES S. COREY, recalled by the complainant as a witness in rebuttal:

Complainant's Exhibit 7 contains all the elements of the first Gilchrist block assembled in the fall of 1909, the only difference being that the first block had only one ear on the oil side.

Am manager and superintendent of the Willapa Harbor Iron Works, which is an assumed trade name of Mr. Gilchrist, the complainant; the Willapa Harbor Iron Works is not a corporation.

Mr. Gilchrist has secured fourteen patents on logging equipment manufactured by the Willapa Harbor Iron Works, six of which are on logging blocks, two with reference to sheaves and four with reference to blocks.

UPON CROSS EXAMINATION:

The first block assembled in the fall of 1909 had one lug on the oil side and two lugs on the plain side, and the top or head piece had three lugs, two lugs on the one side and one on the other; and except for that one feature it corresponds with Complainant's Exhibit 7.

UPON RE-DIRECT EXAMINATION:

Since 1910 the Willapa Harbor Iron Works has been continually manufacturing the Gilchrist type of self-oiling block and the production of these blocks increased as time went on.

UPON RE-CROSS EXAMINATION:

The first block was similar to Complainant's Exhibit No. 7 so far as the oil chamber was concerned, the oil side was an enlarged portion, full size of the side; in our later design in high-lead blocks we confined the oil chamber to a narrow strip down the center of the side, the new design making a narrow reservoir from the lugs to the bearing.

TESTIMONY OF L. E. YOUNIE, recalled as a witness on behalf of the complainant in rebuttal:

Have examined the prior patents and various exhibits that have been introduced in this case to show anticipation, but I do not find all of the elements of claims 1, 4 or 5 of Gilchrist patent No. 977,613 in combination in any one of the exhibits here, or in the prior art; I do not find all the elements of the com-

bination of the first claim of Gilchrist No. 977,613 in the Morgan patent, but I agree with Mr. Reynolds, the expert of the defendant, that the Morgan patent of all patents introduced in evidence is the nearest approach to meeting claim 1 of Gilchrist No. 977,613; in the Morgan patent the interior oil chamber specified in Gilchrist is lacking; as I understand the term "interior," it means within the confines of the inside and the outside of the block side; the reservoir in the Morgan patent is not interior for the reason that I cannot find it within the confines of the inside and the outside of the block side and is not an interior chamber in the sense that Mr. Gilchrist had in mind, or in any sense; the reservoir on the Morgan patent is simply an oil receptacle attached on the outside by means of rivets and it has the effect of weakening the block side to the extent of the amount of material drilled out of the block side to make place for the rivets, which is of considerable moment if you count the number of rivets that are supposed to be used in that side, it takes quite a bit of material away. The Morgan block would not be a practical logging block because the abuse and rough usage to which it would be subjected as all logging equipment is from time to time, would incapacitate it, make the oil receptacle leak and it would be of no use; it is not necessary to break the side before impairing the use of the chamber for if it were subjected to a blow sufficient to loosen up the rivets, or turn up the edge of the applied piece slightly, the oil would run out, and you wouldn't have an oil chamber; if there were leak-

age at the top air pressure would be admitted which would materially affect the rapidity with which the oil would flow out of it, which I consider of very great importance in an interior oil chamber.

With reference to a comparison of costs in the production of the Morgan side and the Gilchrist side, let us take Defendant's Exhibit "T" for illustration; this side will weigh in cast steel about twenty pounds, which can be purchased for twenty cents a pound today; if you want to incorporate in one of these sides an interior oil chamber it will cost you about two cents a pound more to do so, which would be the first and last additional cost to install the oil chamber, or forty cents; the plain side would cost $4.00 and the oil reservoir side would cost $4.40; the outside piece of a Morgan block in the same side would cost as follows: six pounds of material at forty cents per pound —$2.40; sixteen rivets at five cents apiece—$0.80; machining the plate and drilling the holes and getting it ready to apply—$0.25; or a total of $3.45, making the Morgan block side of the size of Defendant's Exhibit "T" cost $3.00 more than the Gilchrist block side of the same size.

"Q. Now would you need any more additional material if it were properly distributed, to have an oil chamber side as contrasted with the plain side?

"A. Not an ounce; the same amount of material if properly distributed will make a stronger side with the oil chamber, than without.

"Q. What is a common illustration of that?

"A. Well, it is a well known fact in mechanics that a hollow member, like a piece of pipe, is stronger than a solid member containing the same amount of material, subjected to any strain, whether torsional or bending strain."

(*Transcript of Testimony, page* 472.)

Defendant's expert, Mr. Reynolds, stated that there was no consideration that governed the width of the sheaves of the pulley block; I do not agree with his conclusion for there are very definite considerations which I, as a designer of pulley blocks for sixteen years at the Willamette Iron & Steel Works, am familiar with as governing the width of sheaves.

"A. In the first place the width of the sheave is governed by diameter of the line which is supposed to be used on the sheave. In designing a block a matter of very first consideration is to keep the weight within certain limits; keep the weight as low as possible, and have material enough to stand the strain, but keep the weight down. That is what we all try to do, because these blocks are manually handled over ground that is very difficult for a man to get over. They have to be carried up mountain sides, up hillsides, over logs, and through underbrush; through gulleys and ravines, where even a man's footing is sometimes—it is difficult for a man to get his footing; difficult for a man to get over; these blocks often have to be carried. So you can see that it is a very important—it is important that we keep down

the weight within certain bounds, making the sheave no wider at the rim than just necessary to accommodate certain size rope. You can readily see that the only means left for us to avail ourselves to get a long bearing is to put in the annular recess. We can't build a sheave with a rim four inches wide, because we want a bearing four inches wide. If we want to use a one-inch rope in that block, we would make the rim one and a half, or one and three-quarter inches. Then put in an annular recess. This gives a long bearing; we haven't the big mass of rim and the big mass of block."

(*Transcript of Testimony, pages* 475 *and* 476.)

I find very close cooperation between all the elements in the several claims of the Gilchrist patent.

"Q. Will you please explain the cooperative relation between the parts of the block?

"A. Well, I find with the conditions existing out in the woods, where these blocks are performing the function for which they are built—we go out in the woods and find this block suspended by a wire sling to some tree or some stump, and the line is running over the sheave with a load of some dimensions, we don't know what. The block in the first place is suspended by a removable top, which not only suspends the block, but is performing the function of holding the sides in position. The pin is assisting and cooperating with the top to hold the sides in position. The shoulders of the pin are fixed against the inside faces of the sides; pin sheave rotably

mounted thereon, is turning on the pins. I find the ends of the pins terminally mounted in the sides, with the axial opening communicating with the oil chamber, conducting oil through the axial opening and through the radial bores to the bearing surface of the pin. The sheave in its rotations is wiping the oil away from the axial opening or the radial opening, and distributing it uniformly over the whole extent of the pin bearing, the sheave running normally and freely between the sides. The oil chamber is at the same time cooperating; it is retaining the oil, holding it, and feeding it to the axial opening in the pin, as required, as it is carried away by the motion of the sheave. I find if the sheave would stop—

"Q. Just a moment. If the removable top or any portion thereof should be so weak as to permit of the sides to approach each other, what would be the effect?

"A. The first effect might be to put a frictional load, and that vice like action on the side of the rim, and tend to stop—

"Q. The rim of what?

"A. The rim of the sheave. It might not stop it, but applied with sufficient force might stop the sheave from rotating.

"Q. What effect yould that have upon the oil system?

"A. It would stop the whole operations; would stop the whole function of the block.

"Q. Of the oiling system particularly. Would any oil be fed to the pin?

"A. No, the oil would not be fed to the pin, or distributed over the bearing surface; the sheave is stopped.

"Q. Might be a little oil fed to the pin, but it would not be distributed?

"A. A little oil might run through the bearing and drop out—off the block.

"Q. It wouldn't be distributed over the bearing?

"A. Because the sheave is stationary; the sheave is not moving enough to distribute the oil over the bearing surface.

"Q. Then you find that all of the parts and all of the elements of that block are in cooperative relation, one dependent upon the other?

"A. I find them all in cooperation, each one depending upon all the others.

"Q. You regard that pulley block as a unitary integral?

"A. I certainly do. If you have in mind the function for which the block is designed."

(*Transcript of Testimony, pages* 476, 477 *and* 478.)

I have examined Defendant's Exhibit "Y," a Mallory block, and find that it contains substantially the elements of claims 1, 4 and 5 of Gilchrist No. 977,613; I would say that it is an exact copy of a block described by claims 1, 4 and 5 of the Gilchrist patent No. 977,613.

I have also examined Defendant's Exhibit "X," the other type of Mallory block, and find that it also contains all the elements shown in claims 1, 4 and

5 of Gilchrist No. 977,613, but there is a slight difference in the pin, the axial opening communicating with the oil chamber by way of radial connection; this difference does not in any way affect the question of infringement; the pin has two shoulders and is terminally mounted in the sides; the axial opening communicates with the oil chamber through radial holes rather than through the end of the pin; the pin is terminally mounted in the side, the only difference being that the thread is on the outside fastened by a nut; it doesn't make any difference whether you put the threads in the sides or have them in the nut on the outside.

There is another very slight difference in the closeness with which the hub fits in the Mallory and the Gilchrist blocks; in the Mallory block it does not fit quite as deeply, quite as closely as in the Gilchrist block, which would thus impair its efficiency as a dust protection.

UPON CROSS EXAMINATION:

I don't claim to be an expert on patents, but I own seven or eight myself and have spent something like three or four thousand dollars getting patents and know something about them; a combination in patent law, as I understand the term, is the putting together of elements that have different functions, with the major function in view, using the different elements and their different functions, to perform the major function. I don't understand that there must be a change in the function which an old element

performs in order to give you a combination patent; in fact, I know there doesn't need to be any change, nor a new result obtained by each element, but if the combination performs the major function in a more satisfactory manner, it has been held that it is an invention; these elements of the several claims of the Gilchrist patent as far as I have been able to find in examining the patents and exhibits here produced are not all applied together in any one patent; I believe that all of the elements have been found separately or in different combinations except the interior oil chamber; the Ludford patent discloses an interior oil chamber and I do find all of the elements performing like function in the prior art; if the block side were cast on in the Morgan patent, I would consider that would fall in the Gilchrist claim; the distinction that I make between the Morgan patent and the Gilchrist patent, with reference to the element of an interior oil chamber, is that the Morgan patent is riveted on and in the Gilchrist patent it is cast integral in the side; the method of fastening the pin in the side as shown n Mallory block, Defendant's Exhibit "X," is equivalent to the method described in the Gilchrist patent; I consider the fact that the addition of the oil chamber in the Gilchrist block makes a stronger side is a function that belongs to the Gilchrist patent; it makes no difference whether the oil chamber extends over the whole side or is confined to a narrow strip, one is the equivalent of the other. The block side of Complainant's Exhibit 8 would be just as strong as the block side of boiler

plate and might be a good deal stronger; in the Morgan block the drilling out of the holes to put in the bolts and rivets weakens the side and the side is weaker than it was before the holes were made and the additional piece riveted on; heavy construction work, as large bridges, etc., are built up of strips riveted together as a matter of convenience, I don't believe it would be possible to cast the Morrison Street Bridge in one piece; two pieces of metal riveted together and combined are stronger than one of them alone; if, in the Morgan block side, you made use of both pieces to take the strain, then the side would be stronger than it was before the chamber was riveted on; but in the Morgan block the side riveted on is not located so that it takes any partof the torsional or tension strain.

I can't conceive of the tension strain which must pass between the head and the pin, ever taking this circuitous route out through this metal, when it can go down through here; there will be no strain on this metal here until this is ruptured, or passes the elastic limit.

If the block side were broken then the side which was riveted on might help to hold it; there might be enough metal put in the piece which was riveted on to hold the block, after the block side was broken.

Have had practical experience in the block business and know that there is trouble with a cored out casting by reason of the sand loosening up; in the cast side you might get some sand through the passages over on the bearing that would have a tendency

to cut the bearings; if you have a boiler plate riveted on to the side of the reservoir you wouldn't have any sand but you might have chips or scale, or something equivalent to sand; you can thoroughly clean your casting by pickling it out with acid; I have heard the complaint of loggers that the blocks have ground out from sand cores; I have designed blocks recently with the core in such shape to make it easy to clean out; the core sand is a disadvantage but I don't hold that it is hard to clean out.

Witness' attention is called to an advertisement in the Timberman of Skookum blocks, entitled, "The Inside Story of the New Skookum Blocks. Note the sand-proof steel reservoir securely welded in the block side." The same was introduced in evidence and marked "Defendant's Exhibit 3-Y."

Referring to the block shown in the last exhibit I do not think that it makes as good a reservoir as the Gilchrist reservoir, it is built up of thin galvanized iron or something like that; I do not think that kind of a reservoir would stand abuse out in the woods; I had nothing to do with designing this block; there were no rivets used to place that reservoir in place and the side has not been weakened, nor is there any projection to be knocked off.

"Q. Do you consider this illustration shown in Defendant's Exhibit 3-Y, answers all of the elements of Claim 1 of the Gilchrist patent?

MR. PECK: Objected to as incompetent, irrelevant and immaterial. That is not in the prior art, and is not claimed in the prior art.

MR. M'CARTHY: We are testing out the man's ability to show what elements are in.

"A. I think that this block conforms to all the elements in the Gilchrist patent, Claim 1."

(*Transcript of Testimony, page* 492.)

If the reservoir were welded on in the Morgan block I would say that it would conform to the claim of the Gilchrist patent; if the Gilchrist top were a solid top instead of a removable top, there would be no difference in the function of the oiling device while in operation; the oiling device only operates while the block is in operation; a solid top would make no change in the oiling function; the removable top co-acts and helps the oiling devices performing their functions in that it is cooperative with the pin to hold the sides in position, although any solid top will do the same thing; the function of the removable top is not necessary at that time, it performs its function at another time, it performs a different function, that of removing the line from the sheave and removing the block from its shackle, has no connection with the oiling of the block when removing the block; it has connection with the oiling of the block when the block is running as it holds the sides out in position; the solid top would hold the sides in position but it woud not do the other thing; they are independent functions; the function performed by the removable top is old in the prior art; the oil would feed upon the sheave in the same way

from an oil reservoir formed by an elbow or a barrel as shown in Dfendant's Exhibit "D"—the same way that it would from an interior reservoir of the Gilchrist patent, the difference being the amount of reservoir capacity, provided, of course, if you could keep the elbow reservoir on the block.

"Q. I understand you to say that. Now while you were examining the Mallory block, you called attention to the fact that there was a slight difference in the hole of the pin in one of these blocks, in that the hole communicated with the oil chamber by entering the side instead of entering an axial bore at the end of the pin, so that the oil fed from the chamber through the hole in the side of the pin then through the central bore of the pin, and out again through the radial hole on the bearing. I understood you to say that was practically the same thing, amounting to an equivalent of the oil passing directly through the end of the pin?

"A. Yes, you have the right understanding.

"Q. You don't understand that any new element or any real element which could be claimed as a new element, is introduced by that change, do you?

"A. No.

"Q. In fact if that oil were required to take a circuitous route and pass through two other holes before passing through the center of the pin, if it were so it could feed readily by gravity, and communicated so it would feed rapidly through the oil chamber to the bearing surface of the pin, it would be a mechanical equivalent?

"A. Might get the oil there if passed through twenty holes.

"Q. Would be a mechanical equivalent?

"A. No, would not be a mechanical equivalent.

"Q. How many holes do you have to have before it would vary?

"A. This claim reads very clearly that the hole in the end of the pin communicates with the oil chamber. You know what communicate means, as I understand it.

"Q. What do you understand?

"A. Webster's dictionary says: to communicate, one to open into another. Now if the pin and the hole in the pin must communicate with the oil chamber, then the pin must open into the chamber.

"Q. That is an axial opening described in the Gilchrist patent?

"A. The opening—

"Q. Axial opening, is it not?

"A. In the pin.

"Q. Axial opening, is it not?

"A. Opening into the chamber.

"Q. We will read from Claim 1: "A bearing pin terminally mounted in the sides, and having an axial opening communicating with the chamber." That is the language of the claim, is it not?

"A. Yes, it says so.

"Q. Is a hole through the side of the pin an axial opening?

"A. No.

"Q. It is not?

"A. A hole through the side of a pin is not an axial opening.

"Q. Then, according to your construction, there is no hole in this pin axially communicating with the oil?

"A. Axially. What do you mean?

"Q. Axially opening in the chamber.

"A. The hole in the pin communicates with the chamber.

"Q. Not an axial hole?

"A. Certainly that hole is axial.

"Q. That one coming up through the side?

"A. That is a hole.

"Q. I speak of the hole going through the side as a radial hole. Where is your axial hole opening directly into the chamber.

"A. Right here.

"Q. Is that an axial hole?

"A. That is an axial hole.

"Q. Does that open into the chamber?

"A. Yes.

"Q. Where does that open into the chamber?

"A. Here.

"Q. This hole here opens here. The axial hole opens through the raidial hole, does it?

"A. The axial hole enters into the chamber. It goes clear through the chamber.

"Q. Does it communicate with the chamber?

"A. Yes, it enters into the chamber and goes clear through and comes out the outside.

"Q. Does it communicate with the chamber?
"A. Yes, it does.
"Q. Through what, a radial hole?
"A. It is in the chamber.
"Q. Does it communicate with the chamber?
"A. Yes.
"Q. Through an axial hole?
"A. Through that hole.
"Q. What is that hole?
"A. That is a three-eighths inch hole.
"Q. What is it, radial hole or axial hole?
"A. Radial hole."

(*Transcript of Testimony, pages* 495-498.)

The Mallory block having separable sides is old in the prior art; there is no co-action between the separation of the sides and the manner of lubrication; you couldn't very well hold a block with one side; if you oil through one of the sides the fact that they are separable has no relation to lubrication, but if you oil through both of the sides, it does; the fact that the sides are separable helps you to take the block to pieces, which is a function entirely distinct and separate from oiling, and is old in the art; the shouldered pin is old in the art; the purpose of the shouldered pin is to hold the separable sides in their proper position to keep them from crowing; it is old in the prior art; the pin terminally threaded to engage the two sides is old in the prior art; the function of the threads and of the pin is to hold the block to-

gether, and there is no connection with the oiling or lubricating of the block; the matter of the pin having an axial opening and a radial hole from the opening bored axially in the pin to the bearing surface of the pin, to permit lubrication of the bearing, is old in the prior art; the function in the oiling device of a pin or block when the reservoir is enlarged is a question of degree and time, and except as to the question of degree is old in the art; the matter of a sheave journaled for rotation upon a pin and having oppositely disposed bosses is old in the art; I don't know as anyone ever attempted to have the bosses "fit closely but antifrictionally"; referring to Opsal patent No. 845,041, it looks as though they fitted closely; the oppositely disposed bosses of the Hammond patent No. 876,176 fit closely and frictionally into annular recesses; and if practical would be a better construction than the Gilchrist construction, it carries out the claim of the Gilchrist patent to a greater degree than the Gilchrist device; the words "anti-frictional" mean that two surfaces are close together not touching; one doesn't retard any motion of the other; so far as the dust-proof feature is concerned the Hammond device meets all the elements of the Gilchrist patent; there is nothing in the Gilchrist patent which shows the Gilchrist device has a closed top, and there is nothing in the Gilchrist patent which claims a regulation of the flow of oil by opening or closing of the top; the Gilchrist attachment of the top by means of lugs or ears is old in the art and performs no function in connection

with the oil reservoir; the function of the lugs is simply the matter of making a mechanical connection; the matter of having a top with lugs so as to properly register with lugs on the side is old in the art, and used for the purpose of supporting the blocks and properly spacing the sides, without any other purpose; I find in the exhibits introduced here, patents and devices, each of the elements which we find in the claims of the Gilchrist patent, as being old in the art, used for like purposes and performing like functions.

"Q. You also found that the Mallory side, with recesses in the side, was not adapted to fit closely to the oppositely disposed bosses of the sheave?

"A. I said I found it didn't fit quite as close as Mr. Gilchrist's.

"Q. It doesn't fit closely at all, does it? You don't claim it is a close fit between the outer surface of that boss and the recess?

"A. That depends upon what you call a close fit?

"Q. I asked you. You wouldn't call that a close fit, would you?

"A. In comparison with what kind of a fit?

"Q. No attempt to fit at all, is it?

"A. No attempt to fit frictionally, no.

"Q. No attempt at a fit, at all. It is just a means of supporting the recess from the side of the shell, is all, isn't it?

"A. Sure.

"Q. That is all it is intended for, is it not?

"A. The same intent, bringing this down in this shape. The same intent was in Mallory's mind as was in Gilchrist's mind when he brought it down.

"Q. I didn't ask you to pass on what was in their minds.

"A. Let me go further. Let me finish the answer. I have designed these block sides, and instead of putting this recess in that form and show that angle, and bring it close to the hubs, I brought the metal down, starting at a point up here, in a point out here beyond the rim of the sheave, and I have gone right straight to that center piece.

"Q. Would you consider you were within the claims of the Gilchrist patent?

"A. No.

"Q. When you did that?

"A. No.

"Q. Why not?

"A. I consider a different construction. There wasn't any attempt at a hub fit, at all. No relation between the size of the hub and the size of the annular recess.

"Q. And the purpose of that was to get a long bearing, was it not?

"A. The purpose of that was to get a long bearing.

"Q. Isn't that the only purpose stated in the Mallory block?

"A. I didn't have in mind the possibility of keeping the bearing cleaner; keeping the sand and other

matter out of it; that I know Mr. Gilchrist had in mind when he made his model.

"Q. You don't know what Mallory had in mind when he made this?

"A. I can judge by looking at the block.

"Q. Does that look as though intended for a dust proof block?

"A. Yes.

"Q. With this extending out at an angle of pretty near forty-five degrees, and coming to a sharp edge, with a hole open to all the dust?

"A. If not, why did he come up here at all? Makes a poor connection. Why didn't he start a pin bearing and go straight down?

"Q. Ask him about that, although it makes a neater block. Don't you think it looks better.

"A. I don't know as any neater, no.

"Q. Don't you think it more attractive to the eye of a logger?

"A. A logger don't look for attractive eyes. He looks for serviceable things.

"Q. Don't you try to design blocks to appeal to the eye of the logger, as well as for practical purposes?

"A. That never entered my head, to please the logger's eye. I tried to meet his requirements."

(*Transcript of Testimony, pages* 504-506.)

UPON RE-DIRECT EXAMINATION:

In answering the question on cross examination of the effect that if the outside chamber of the Morgan patent were welded it would contain the elements of the Gilchrist patent, I understood that I was answering the question as to claim 1 of Gilchrist and did not intend to state that the Morgan patent if so welded would answer claims 4 and 5 of the Gilchrist patent; I consider that the dust-proof feature of the Gilchrist block has been slightly impaired by the Mallory construction.

TESTIMONY OF F. B. MALLORY, recalled as a witness on behalf of the complainant in rebuttal:

Witness identifies the catalogue of 1912 and refers to a cross sectional view or cut of the Gilchrist block as shown on page 34 of said catalogue.

Mr. Gilchrist furnished me the copy from which that cut was made; I have not given Mr. Gilchrist any credit in this advertisement but have designated the block as "Diamond M Trip Block with oil reservoirs"; the Diamond M is the trade mark of the F. B. Mallory Company; the Gilchrist block is marked in this catalogue with my copyrighted trade mark but Mr. Gilchrist was familiar with that at the time.

Witness identifies his catalogue in 1913 and the same was introduced in evidence and marked "Complainant's Exhibit 34."

This catalogue shows no self-oiling blocks of the type in suit; my current catalogue shows some twenty-five varieties of self-oiling blocks.

Witness identifies defendant's advertisement in the Timberman of January, 1916, and the same was introduced in evidence and marked "Complainant's Exhibit 35."

Witness identifies page 22 of the Timberman of March, 1916, as defendant's advertisement and the same was introduced in evidence and marked "Complainant's Exhibit 36."

Witness identifies page 26 of the Timberman of May, 1916, as defendant's advertisement and the same was introduced in evidence and marked "Complainant's Exhibit 37."

Witness identifies page 28 of the Timberman of November, 1917, as defendant's advertisement and the same was introduced in evidence and marked "Complainant's Exhibit 38."

Witness identifies page 28 of the Timberman of June, 1919, as defendant's advertisement and the same was introduced in evidence and marked "Complainant's Exhibit 39."

UPON CROSS EXAMINATION:

Mr. Gilchrist was furnished a copy of my catalogue No. 5, showing the cut of his block and the shape it was in; he was notified before the catalogue was issued and the cut requested; he made no objection to the advertisement.

The blocks shown in our advertisements have a distinctive design of their own, in shape, form, style of sides and pin arrangement; I was the first man to get out blocks of this distinctive design; the first sky-line and high-lead blocks of this design with auto-lubricating sides were put out by the defendant in March, 1914; Gilchrist had no blocks of that character on the market at that time for high-lead or sky-line purposes; the first I remember of seeing Gilchrist blocks of that kind was in an advertisement of the Timberman in February, 1916.

MR. M'CARTHY: We have a right to meet the new matter. Here is what we would like to do; a man with experience in logging to meet this defense brought out; probably put Mr. Mallory on for a short time. And as a matter of showing whether or not our testimony is correct, I would like Court and Counsel to go down and look over the stock and catalogues, the exhibits of blocks as now sold on the market by the defendant, as verification of our testimony in this respect. Mr. Mallory, the defendant here, is probably the biggest logging supply man on the Pacific Coast, and his stock certainly is indication of which the trade is calling for at the present time.

MR. CARY: Built up on our blocks.

MR. M'CARTHY: It is what we want the Court to see. The only purpose of the oil reservoir is the high lead block. Many manufacturers don't manufacture a block with oil reservoir except for a high lead block.

TESTIMONY OF CHARLES S. COREY, recalled as a witness on behalf of the complainant in rebuttal:

I took over the active management of the Gilchrist plant, the Willapa Harbor Iron Works, on March 2, 1920, have been in active management a little more than three months; think proportionate output of the plant is about twenty self-oiling blocks to one grease cup block; the last three months have put out one hundred and twenty self-oiling blocks and five grease cup blocks, we have more orders for self-oiling blocks than we can fill; we advertise both the self-oiling block and the grease cup block, and are able to furnish what the trade demands.

Complainant's catalogue introduced in evidence and marked "Complainant's Exhibit 40."

Complainant's Exhibit 40 was issued and published in 1914 and was the catalogue of the Complainant next prior to Defendant's Exhibit "3-W."

UPON CROSS EXAMINATION:

We make a special feature of the oil reservoir blocks.

File wrapper of Gilchrist Patent No. 977,613 introduced in evidence and marked "Complainant's Exhibit 41."

COMPLAINANT RESTS.

TESTIMONY OF F. B. MALLORY, recalled as a witness on behalf of the defendant in sur-rebuttal:

Catalogue of the defendant introduced in evidence and marked "Defendant's Exhibit 3-Z." This catalogue was issued in 1911 and shows on pages 24 and 25 a guard with a cross bar between the shackle and the sheave; Complainant's Exhibit 4 is our most recent catalogue, in which we show one hundred and forty-seven numbers of logging blocks, thirty-two of which have oil reservoirs in the sides and the balance have oil reservoirs in the pin or with straight or elbow oil cups on the ends of the pin; seven logging blocks are shown with reservoir side and guard or cross head; nine blocks are shown with the cup or elbow design with cross heads; we have never considered making a moving block, a butt chain block or a yarding block with an oil chambered side, all of our blocks of this character are made with an integral oil chamber in the pin; the stock which we carry corresponds with our catalogue; we carry a full line of stock to keep in touch with logging demands, covering the entire Coast from British Columbia to Arizona with some export business, and some business in eastern states; the plate steel or sheet steel sides of blocks are as serviceable, if not more so, than the cast steel sides; we are making, and have always made, blocks with sheet steel sides; we have the skyline equipment, the heaviest equipment that is made, and it is made of sheet steel sides with reinforced

strips riveted on the outside; the overhead carriages are either lubricated with elbow oil cups screwing on the end of the pin or by a reservoir that is attached to the end of the pin and held in place by rivets or set screws as illustrated in Complainant's Exhibit 4, at pages 79 to 89, inclusive; the purpose of using cast sides is because they are more readily adapted to design and distinctiveness than the forging would be; castings are more uncertain and they are not to be as freely depended upon as forging or sheet steel sides because of the blow holes or sponginess that occurs.

Witness identifies Diamond M cast side as a side in which defects have appeared and the same was introduced in evidence and marked "Defendant's Exhibit 4-A" The defects in Exhibit 4-A were that the metal didn't run about in one place in the oil reservoir, and caused a leakage, and in the other place the support of the core was imperfect, and there is a leak around that; these defects would not have occurred in a block of boiler plate or sheet metal, because a joint could be either riveted with a gasket that would make it tight, or with acetylene to weld to the side itself, and thereby preclude any leakage of any kind; the boiler plate or forged steel plate is free from blow holes, because it is rolled and re-rolled from a cast ingot, until the flaws and defects practically all adhere or else disappear.

Witness identifies Diamond M block side and the same was introduced in evidence and marked "Defendant's Exhibit 4-B."

This side shows a defect in that after the hole was drilled in the lugs it opened a fissure that had not been found before, making it practically useless so that the side was discarded; blow holes developed in it and caused leakage after the blocks had been sent out by the trade. I never knew of a guard of the type of Complainant's Exhibit 33 ever being placed on the market, marked with the Gilchrist patent; I never placed guards on the market, marked with the Gilchrist patent, nor gave my consent thereto to anyone else; I never knew of anyone makinga guard of the type covered by my designed patent prior to the making of one by myself and applying for a designed patent thereon.

UPON CROSS EXAMINATION:

I also make a guard with a finger attached to the shackle; obtained a patent for that form of guard upon application of December 16, 1911; we are still using both the H form and the finger form of guard, probably more of the finger form of guard than the H form of guard.

"Q. Now with reference to the utility of this reservoir type of block, you are willing to admit that that type of block is a commercial success?

"A. Yes.

"Q. And you are willing to admit that for high-lead purposes the oil reservoir block has displaced the grease cup block?

"A. Oil reservoir block has been displaced—is more practical for high-lead purposes than the grease cup block or oil cup block.

"Q. And for high-lead purposes you are willing to admit, has displaced the grease cup block?

"A. But could be made with either forged or cast steel sides shown here.

"Q. Answer the question. You are willing to admit the type of block, with reservoir in the side here, has displaced the grease cup block and other types of block, with reference to the piling function, for high-lead work?

"A. We never used the blocks for high lead—

"Q. Answer the question, yes or no.

"A. Couldn't be any displacement because not used before.

"Q. Then there isn't any other type of block used for high-lead work?

"A. No.

"Q. Except—

"A. The oil reservoir block.

"Q. (Continued)—The oil reservoir block?

"A. Correct.

"Q. And you are also willing to admit that the high-lead system of logging is an advanced step in the logging industry?

"A. Yes, sir.

"Q. And that it has come to stay?

"A. Yes, sir.

"Q. And makes logging more economical?

"A. Yes, sir.

"Q. Get out more logs with the high-lead system?

"A. Yes, sir.

"Q. For the same outlay of expenditure—same outlay of expense?

"A. No, I won't say that; it costs more money to operate a high-lead, and equipment for high-lead is more expensive than it is for ground work. Be a very great deal of expense setting the camp and rigging the tree; very much more expensive.

"Q. But the proportionate increased production more than over-balances that?

"A. All depends on the condition of the ground, the size of the timber, and the size of the donkey engine.

"Q. You are going back on your testimony. You have already admitted that the high-lead system is a step in advance in the logging industry.

"A. I said so.

"Q. And has come to stay?

"A. Yes.

"Q. And no other form of block is used in that system of logging except the type of block in suit here?

"A. With oil reservoir side.

(*Transcript of Testimony, pages* 526-528.)

The largest producers of the logging blocks on the Pacific Coast were the Washington Iron Works in Seattle, Stewart Brothers, Willamette Iron & Steel Works, Smith & Watson Iron Works, and the F. B.

Mallory Company of Portland; we are probably the largest producers.

MR. McCARTHY: If the Court please, I don't think that is competent for the attorney to introduce catalogues of other firms here, not connected with this case. Especially on cross-examination of the defendant.

COURT: What do you claim for the catalogues of other firms?

MR. PECK: To show the way in which they are pressing this reservoir form of block.

MR. McCARTHY: I don't see that that has anything to do with the case.

MR. PECK: To show the utility of it. Whether it is used; the commercial success of it.

COURT: I don't understand there is any question about the utility. Used substantially exclusively for high-lead work.

MR. PECK: And the commercial success of it.

MR. McCARTHY: We are willing to admit the commercial success.

MR. PECK: On that theory of the case, for whatever it may be worth, we would like to offer the catalogue of the Washington Iron Works and the catalogue of Stewart Brothers, together with the catalogues of the Mallory Company.

COURT: File them with the reporter, if of any service.

(*Marked Complainant's Exhibits* 42 *and* 43.)

MR. PECK: That is all.

RE-DIRECT EXAMINATION:

Question by Mr. McCarthy:

"Q. One question I neglected to ask Mr. Mallory. Who was it, Mr. Mallory, that promoted the adoption

of the high-lead or skyline system of logging in the Pacific Northwest?

MR. PECK: Incompetent, irrelevant and immaterial. Not a material question in this case.

COURT: I don't know what you are claiming for that?

MR. McCARTHY: This is what I claim for it: That the defendant himself was the one who promoted and urged upon the camps the introduction of the skyline system of logging, and made his own logging blocks adapted thereto at least two years before other manufacturers followed up with blocks for that system of logging.

COURT: Before the Gilchrist patent?

MR. McCARTHY: Not before the Gilchrist patent, but before blocks were made by Gilchrist for that purpose.

COURT: That wouldn't affect the validity of the patent one way or the other.

MR. McCARTHY: No, I don't think it would. Just shows something on the question of good faith, as to whether one was trying to get the other's patent away from him. That seems to be what this case has reduced itself to.

COURT: That is not the issue in the case. The issue in this case, as I understand it, is whether Gilchrist's device was patentable, and if so, whether the defendant infringed. I don't think it makes any difference in the case who promoted the work.

(*Transcript of Testimony, pages* 529-531.)

TESTIMONY OF E. L. TAYLOR, recalled as a witness on behalf of the defendant in sur-rebuttal:

United States Letters Patent No. 349,691, issued to H. Butters, dated September 28, 1886, introduced in evidence and marked "Defendant's Exhibit 4-C."

Witness identifies a block side as one constructed by himself, marked "Taylor, Patent Applied For," and the same was introduced in evidence and marked "Defendant's Exhibit 4-D."

I did not receive a patent on that style of block but made application for it in 1911.

Defense Rests.

United States Letters Patent No. 1,145,110, issued to B. C. Ball, of date July 6, 1915, introduced in evidence and marked "Complainant's Exhibit 44."

Complainant Rests.

In accordance with the stipulation of counsel in open court at the time of the admission of the foregoing patent, defendant thereafter introduced in evidence the file wrapper and contents of Patent No. 1,145,110, issued to B. C. Ball July 6, 1915, and the same was marked "Defendant's Exhibit 3-E," and also introduced in evidence the file wrapper and contents of Complainant's Patent No. 1,063,528, issued to John E. Gilchrist June 3, 1913, and the same was marked "Defendant's Exhibit 3-F."

Defense Rests.

Case Argued and Submitted.

CERTIFICATE OF SETTLEMENT AND ALLOWANCE.

The foregoing statement of evidence, in conformity with Equity Rule No. 75, is hereby allowed, settled, and certified to be a true and correct statement of all the evidence introduced and received on the trial of said cause.

Dated at Portland, Oregon, this 14th day of September, 1921.

R. S. BEAN, *Judge.*

And afterwards, on the twenty-second day of September, 1921, there was filed in said Court the following

ORDER.

Upon motion of the complainant and appellant, and for good cause shown, the complainant and appellant is given an extension of time and including the fifteenth day of October, 1921, within which to complete his proceedings on appeal, and to file the record on appeal and docket this cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Portland, Oregon, this 22d day of September, 1921.

R. S. BEAN, *Judge.*

Due, timely and legal service of the foregoing order admitted at Portland, Oregon, this 22d day of September, 1921.

LOYAL H. MCCARTHY,
Attorney for Defendant and Appellee.

And afterwards, on the 11th day of October, 1921, the attorneys for the parties entered into the following

STIPULATION AS TO RECORD.

The attorneys for complainant, having prepared and compared with the original record the within printed transcript,

Now, therefore, it is hereby stipulated and agreed by and between the parties to the within proceedings for an appeal, by and through their respective attorneys, that the within printed record tendered to the Clerk of the United States District Court for the District of Oregon for his certificate, is a true transcript of the record of the within cause and that the Clerk of the said Court shall certify to said printed transcript without comparison thereof with the original record.

GRIFFITH, LEITER & ALLEN,
Attorneys for Complainant and Appellant.

LOYAL H. MCCARTHY,
Attorney for Defendant and Appellee.

And afterwards, on the 11th day of October, 1921, the Clerk of the United States District Court for the District of Oregon executed the following

CERTIFICATE.

The attorneys for the respective parties to the within proceedings, having stipulated that the within printed transcript of record, as prepared, compared and tendered to me for certification by the attorneys for the complainant and appellant, is a true transcript of the record in this cause, and that I shall certify the same without comparison,

Now, therefore, in accordance with the said stipulation, I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing transcript of record upon appeal in the case in which John E. Gilchrist is complainant and appellant, and F. B. Mallory Company, a corporation, is defendant and appellee, is a full, true and correct transcript of the record and proceedings had in said Court in said cause, as the same appear of record and on file at my office and in my custody, the same having been compared by attorneys for appellant.

And I further certify that the fee for the certifying of the within transcript, to wit, the sum of 50 cents, has been paid by the appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Portland, in said District, this 4th day of October, 1921.

G. H. Marsh, *Clerk.*